GREGORY R. OXFORD (S.B. #62333)
goxford@icclawfirm.com
ISAACS CLOUSE CROSE & OXFORD LLP
21515 Hawthorne Boulevard, Suite 950
Torrance, California 90503
Telephone: (310) 316-1990
Facsimile: (310) 316-1330

Attorneys for Defendant
General Motors LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

RUDOLFO FIDEL MENDOZA, individually and on behalf of a class of similarly situated individuals,

Plaintiff,

vs.

GENERAL MOTORS LLC,

Defendant.

Case No. CV 10-2683 AHM (VBKx)

NEW GM'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION [F.R.Civ.P. 12(b)(1)] OR, ALTERNATIVELY, TRANSFER TO THE SOUTHERN DISTRICT OF NEW YORK FOR REFERRAL TO THE BANKRUPTCY COURT [28 U.S.C. § 1412]

Hearing Date: October 25, 2010
Time: 10:00 a.m.
Courtroom 14
Honorable A. Howard Matz

Defendant General Motors LLC ("New GM") respectfully submits this memorandum in reply to plaintiff's opposition to ("Opposition" or "Opp."), and in further support of, New GM's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction or, alternatively, for motion for transfer to the Southern District of New York under 28 U.S.C. § 1412 for referral to the Bankruptcy Court that is handling the bankruptcy case of General Motors Corporation n/k/a Motors Liquidation Company ("Old GM") under 28 U.S.C. § 157(b) ("Motion").

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PRELIMINARY STATEMENT

From its very first paragraph, plaintiff's Opposition reads almost like a response to the Rule 12(b)(6) motion that New GM did not file. The point of the Rule 12(b)(1) motion which New GM did file is *not* that this Court should dismiss plaintiff's case because he cannot state a cause of action, but that the issues here presented must instead be submitted to the United States Bankruptcy Court for the Southern District of New York which in a final and binding order (with full res judicata effect) has retained "exclusive jurisdiction" to protect New GM from having to litigate claims which, if proven, would be the responsibility of Old GM.

In July 2009, New GM purchased the assets of Old GM under an Amended and Restated Master Sale and Purchase Agreement ("ARMSPA"), but it did not assume Old GM's liabilities, except for the "Assumed Liabilities" specifically listed in ARMSPA § 2.3(a). Thus, as plaintiff recognizes, *see* Opp., p. 5, the inescapable threshold question in this case is whether the state statutory liabilities he is alleging, if they could be proven, would belong to Old GM or New GM.

The answer to that question requires application and, possibly, interpretation of the terms of the ARMSPA and of the Sale Approval Order in which the Honorable Robert E. Gerber, United States Bankruptcy Judge, (1) approved the ARMSPA under section 363 of the Bankruptcy Code and (2) retained exclusive jurisdiction to implement, enforce and resolve any disputes concerning the ARMSPA and/or the Sale Approval Order.

Accordingly, New GM has moved to dismiss plaintiff's First Amended Complaint *for lack of jurisdiction* or, in the alternative, for transfer to the Southern District of New York and referral to the Bankruptcy Court. Thus, contrary to plaintiff's statement in the first paragraph of his Opposition, New GM is *not* asking this Court "to interpret the provisions [of the ARMSPA] *and dismiss [the] First Amended Complaint … because … Plaintiff's claims are not the 'Assumed Liabilities' of new GM*." Opp., p. 1 (emphasis added). Instead, New GM is asking

this Court affirmatively *not* to interpret these documents except insofar as is necessary to discern that the Bankruptcy Court has exclusive jurisdiction to do so. That is why New GM did not move in this Court for dismissal under Rule 12(b)(6).

Thus, far from "forum shopping" as alleged by plaintiff, New GM is asking this Court to do nothing more than honor the Bankruptcy Court's retention of jurisdiction over an issue – what did New GM buy from Old GM in the section 363 transaction and subject to what liabilities? – which falls squarely within the Bankruptcy Court's "core" jurisdiction under the Bankruptcy Code.

The ARMSPA and Sale Approval Order embody the single most important transaction in Old GM's bankruptcy case. Allowing other courts to interpret these documents and potentially modify the section 363 transaction after-the-fact by imposing liabilities on New GM that it did not agree to assume not only would flout the Bankruptcy Court's retention of exclusive jurisdiction, but also would open the door to end-runs of that jurisdiction that could lead to conflicting adjudications by state and federal courts concerning the assets and liabilities that were transferred to New GM under the ARMSPA.

Such piecemeal rulings would undermine and threaten the integrity of the bankruptcy process by enabling non-bankruptcy courts to give claimants like plaintiff (and thousands of alleged class members) preferential treatment at the expense of a section 363 purchaser (New GM) which bargained specifically concerning the Old GM liabilities that it would and would not agree to assume pursuant to a detailed written sale and purchase agreement defining its continuing obligations. The Bankruptcy Court which approved that agreement is obviously in the best position to determine what types of liabilities Old GM did or did not pass on to New GM.

And, in fact, in an order issued just last week, Judge Gerber held that he had exclusive jurisdiction over issues concerning another aspect of the 363 transaction: Deferred Termination or "Wind-Down" Agreements under which certain GM

dealers agreed, in exchange for monetary and other consideration, to terminate their GM Dealer Sales and Service Agreements no later than October 31, 2010 as an alternative to outright rejection of those executory contracts under section 365 of the Bankruptcy Code. In several respects, that ruling is instructive.

The plaintiff dealership in that case, a California motor vehicle dealer named Rally Auto Group, Inc. ("Rally"), sought reinstatement of four GM Dealer Agreements through binding arbitration under Section 747, Consolidated Appropriations Act 2010, Pub. Law 111-117, 23 Stat. 3034 (2009). The arbitrator concluded that Rally was entitled to reinstatement of only its Buick, Cadillac and GMC franchises. Rally then sued to vacate or modify the award, and thereby avoid its obligation to terminate its Chevrolet Dealer Agreement pursuant to the terms of the Bankruptcy Court approved Wind-Down Agreement. Rally Auto Group, Inc. v. General Motors LLC, United States District Court for the Central District of California, Southern Division, No. SACV 10-01236 DOC (Ex) (the "California Action").

In response, New GM moved in Bankruptcy Court for an order enforcing the Wind-Down Agreement and enjoining Rally from, among other things, continuing to prosecute the California Action. In granting the motion, Judge Gerber had this to say about the importance of Bankruptcy Court jurisdiction over issues arising under the ARMSPA and Sale Approval Order:

> "[T]he bidders of the world that come in to bid for assets in the bankruptcy court must have knowledge that bankruptcy courts will stand by the documents as they were then drafted to give the parties to those agreements the predictability in their relations for which they are binding and upon which they justifiably rely. The Court in [In re Eveleth Mines LLC, 312 B.R. 634, 645 n. 14 (Bankr.D.Minn.2004)] explained: '[a]s applied to a sale free and clear of liens, there are also good policy reasons for making a derivative core-proceeding

> classification…. Active bidding on assets from bankruptcy estates will be promoted if prospective purchasers have the assurance that they may go back to the original forum that authorized the sale, for a construction or clarification of the terms of the sale that it approved. Relegating post-sale disputes to a different forum injects an uncertainty into the sale process, which would dampen interest and hinder the maximization of value. A purchaser that relies on the terms of a bankruptcy court's order, and whose title and rights are given life by that order, should have a forum in the issuing court.'"

Transcript of Hearing, In re Motors Liquidation Co., No. 09-50026 REG, October 4, 2010.[1] This holding is directly on point here, where New GM seeks protection against a claim that asserts liabilities which New GM simply did not agree to assume. As a result of the Bankruptcy Court's final and binding Sale Approval Order which in paragraph 71 retains "exclusive jurisdiction" over such issues, this Court as a matter of res judicata (leave aside normal judicial comity) is simply without power to decide them. *See* Met-L-Wood Corp. v. Getkas, 861 F.2d 1012, 1016 (7th Cir.1988) (bankruptcy court's sale approval order under 11 U.S.C. § 363 is a final order with res judicata effect that can only be challenged on appeal); Boyer v. Gildea, 2005 U.S.Dist.Lexis 41534 at *11-12 (N.D.Ind.2005) ("The important policy of favoring the finality of bankruptcy court orders approving the sales of debtor assets requires that bankruptcy orders be final judgments for *res judicata* purposes").

ARGUMENT

I. NEW GM IS ONLY LIABLE FOR "ASSUMED LIABILTIES"

Plaintiff claims that New GM is liable under three California statutes based upon an alleged "design defect" in his 2005 Chevrolet Equinox – a vehicle that

[1] A copy of the full transcript of the hearing, including Judge Gerber's decision is attached hereto as Exhibit A.

New GM *did not* manufacture or sell. In fact, it is undisputed that New GM did not manufacture or sell *any* of the vehicles owned by members of the proposed class. New GM therefore has no liability to the owners of these vehicles *unless* it specifically agreed to assume such liability in the ARMSPA.

New GM believes that the express terms of the ARMSPA and Sale Approval Order establish that it does not have any such liability. But GM is not asking this Court to make that determination. Instead, New GM only is asking the Court to recognize that to the extent that plaintiff has any colorable claim, it unavoidably depends on application and interpretation of the ARMSPA and thus must be addressed to Judge Gerber who, under paragraph 71 of the Sale Approval Order, retains "exclusive jurisdiction to enforce and implement the terms of Order ***and to protect [New GM] against any of the Retained Liabilities*** [*i.e.*, liabilities that New GM did not assume under the Order] or the assertion of any lien, claim, encumbrance or other interest, of any kind or nature whatsoever, against the Purchased Assets [which New GM purchased from Old GM]") (emphasis added).

New GM's lack of liability and Judge Gerber's jurisdiction to determine what "Assumed Liabilities" it specifically agreed to accept both follow from the very nature of a "sale free and clear of liabilities" under section 363 of the Bankruptcy Code. The obvious goal of such a sale is to obtain monetary value for the benefit of the debtor's estate and creditors by selling valuable assets of the estate *without the attendant liabilities*. *See* Sale Approval Order, ¶ 7 ("Except for the Assumed Liabilities, … the Purchased Assets shall be transferred to [New GM] free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever … including rights or claims based on any successor or transferee liability").

To the extent that liabilities pass to the purchaser, even on a limited basis, they lessen the purchase price and the value to the estate *pro tanto*. It is therefore very important, both to a section 363 purchaser and to the debtor, to identify

specifically what types of liabilities will be assumed by the purchaser and which will remain with the debtor. Here, in the largest industrial bankruptcy case in history, the issue of assumed liabilities was negotiated in great detail and resulted in very detailed definitions of the categories of liabilities which New GM did and did not assume. *See* ARMSPA § 2.3(a) (Assumed Liabilities); *id*., § 2.3(b) (Liabilities retained by Old GM); Sale Approval Order, ¶ 46 ("except for the Assumed Liabilities expressly set forth in the [ARMSPA], … [New GM] …shall not have any liability for any claims that arose prior to the Closing Date, relates to the production of vehicles prior to the Closing Date, or otherwise is assertable against [Old GM] … prior to the Closing Date"). The teaching of the Eveleth Mines case, quoted above, is that construction of a 363 sale order to determine what assets and liabilities changed hands is a matter for the Bankruptcy Court.

Simply put, New GM should not be saddled with Old GM liabilities that it did not agree to assume and, indeed, should not be required to litigate claims asserting such liabilities in non-bankruptcy courts when Judge Gerber has express and exclusive power to resolve such claims. *See* Sale Approval Order, ¶ 71.

II. PLAINTIFF'S CLAIMS ARE NOT FOR "ASSUMED LIABILITIES"

As discussed above, New GM is liable to plaintiff only to the extent that this action involves liabilities which New GM expressly agreed to assume under ARMSPA § 2.3(a). Only two categories of the "Assumed Liabilities" defined in that section are even potentially relevant, and in New GM's view neither applies here. But the final arbiter on that issue is, and must be, Judge Gerber.

A. Plaintiff's Claims Are Not for Assumed "Product Liabilities"

Plaintiff first asserts that New GM is liable under California's Consumers Legal Remedies Act ("CLRA"), Civ. Code § 1750 *et seq*., and Unfair Competition Law ("UCL"), Bus. & Prof. Code § 17200 *et seq*., because it allegedly assumed "product liabilities" under ARMSPA § 2.3(a)(ix). *See*, *e.g.*, Opp., p. 6. But neither plaintiff's CLRA claim nor his UCL claim asserts any claim for "product liability"

either in the general sense (strict liability for *personal injury* or *property damage* based on alleged product defects) or under the more specific definition of "Product Liabilities" contained in ARMSPA § 2.3(a)(ix):

> "all liabilities to third parties for death, personal injury, of other injury to Persons or damage to property caused by motor vehicles … manufactured, sold or delivered by [Old GM] (collectively, "Product Liabilities"), which arise directly out of death, personal injury or other injury to Persons or damage to property caused by accidents or incidents first occurring on or after the Closing Date and arising from such motor vehicles' operation or performance…."

Thus, to be an Assumed Liability under section 2.3(a)(ix), a claim must (1) be for death, personal injury or property damage caused by motor vehicles and (2) arise directly from accidents or incidents occurring on or after the Closing Date. Plaintiff's allegations satisfy neither of these requirements.

1. Plaintiff Is Suing for Non-Disclosure, Not Property Damage

The First Amended Complaint does not include any claim for personal injury or "property damage caused by motor vehicles." Instead, it seeks monetary and injunctive relief to remedy alleged economic losses caused by claimed violations of disclosure statutes relating to the condition of vehicles sold prior to the Old GM bankruptcy. *See* FAC, ¶¶ 83, 86, 90-91, 103, 109-10, 111b, 111d. Neither economic loss caused by an alleged design defect nor violation of statutory disclosure or reimbursement obligations is included in the categories of assumed liabilities defined in section 2.3(a), including section 2.3(a)(ix) which provides for New GM to assume liability *only* for personal injury and property damage.

To be sure, plaintiff argues that the FAC "is replete with *allegations* of 'property damage'" (Opp., p. 6), but he is not *suing* for property damage caused by motor vehicles. Instead, he is suing for money damages, restitution and injunctive relief based on alleged violations of the CLRA and UCL. If, as plaintiff argues,

New GM assumed liability for violations of consumer statutes, it certainly is not apparent on the face of section 2.3(a)(ix), and there is certainly nothing elsewhere in the text of the ARMSPA or Sale Approval Order indicating that New GM intended to do so. In fact, the exact opposite is true. ARMSPA § 2.3(b)(xvi) confirms in a seemingly straightforward manner that Old GM retains (and therefore New GM did not assume) "all Liabilities arising out of, related to or in connection with any implied warranty or other implied obligation arising under statutory or common law without the necessity of an express warranty." That is why it is mandatory that any alleged ambiguity in the contract language be resolved by the Bankruptcy Court, which approved and possesses very detailed knowledge of the ARMSPA and the overall intent of the parties.

Indeed, according to plaintiff, Judge Gerber already has addressed this issue in his opinion which accompanied issuance of the Sale Approval Order:

> "As Judge Gerber of the Bankruptcy Court noted in ruling on the sale of assets that gave rise to New GM and objections thereto, the Assumed Liabilities include '*all* product liability claims arising from accidents or other discrete incidents arising from operation of GM vehicles occurring subsequent to the closing … *regardless of when the product was purchased*.'" Opposition, p. 8 (emphasis by plaintiff).

GM believes that Judge Gerber was using the term "product liability claims" in its normal sense to refer to strict liability for personal injuries or property damage caused by a design or manufacturing defect rather than to violation of consumer disclosure statutes, but if there is any doubt about the scope of the quoted sentence or the extent of the liabilities which New GM agreed to assume, Judge Gerber obviously is best situated to interpret his own words.

2. Plaintiff's Claims Did Not Arise After the Closing Date

Plaintiff argues that New GM is liable on his statutory claims because they are claims for property damage "arising directly from accidents or incidents or

other discrete occurrences that happen on or after the Closing Date." Opp., pp. 6. Because plaintiff first experienced a water leakage problem after the Closing Date, they say, the problem did not "manifest itself" until after that date; therefore, they say, New GM is liable under ARMSPA § 2.3(a)(ix).

This argument falls first, as explained above, because plaintiff's claim is not for property damage at all but for economic loss stemming from alleged violation of consumer disclosure statutes. But even beyond that initial fatal flaw, plaintiff's argument fails because the duty of disclosure of the alleged "known defect" under the cited consumer statutes arose if at all *prior to the Closing Date* ***regardless of when plaintiff or any other specific owner experienced a water leakage problem***. In other words, the alleged liability did not "arise from accidents, incidents or other discrete incidents" either before or after the Closing Date, but arose instead from alleged knowledge of the defect before the Closing Date that assertedly gave rise to a duty of disclosure on the part of Old GM before that date. Although plaintiff alleges that New GM became aware of the alleged defect on or shortly after the Closing Date, it had no contractual relationship with Equinox and Torrent owners at that time, aside from its express warranty obligations assumed under ARMSPA § 2.3(a)(vii)(A), *see* Part II-B *infra*, so there is simply no basis for any claim that it owed these owners any duty of disclosure. Therefore, plaintiff's "manifestation" argument reduces to nothing more than an attempt to impose forbidden successor liability on New GM based on Old GM's alleged failure to disclose a claimed defect before the Closing Date. *See* Sale Approval Order, ¶ 46.

B. <u>Plaintiff's Claims Are Not for Assumed Warranty Liabilities</u>

ARMSPA § 2.3(a)(vii)(A) delineates the *only* warranty liabilities which New GM agreed to assume:

> "all Liabilities arising under express written warranties … that are specifically identified as warranties and delivered in connection

> with the sale of new, certified used or pre-owned vehicles … manufactured or sold by [Old GM]…."

Paragraph 56 of the Sale Approval Order amplified the limited nature of the assumed warranty obligations:

> "[New GM] is assuming the obligations of [Old GM] pursuant to and *subject to conditions and limitations contained in* their express written warranties…. [New GM] is not assuming responsibilities for Liabilities contended to arise by virtue of other alleged warranties, including implied warranties and statements in materials such as, without limitation, individual customer communications, owner's manuals, advertisements, and other promotional materials, catalogs, and point of sale materials." (Emphasis added.)

These provisions clearly establish that the only warranty liability that New GM assumed was liability under Old GM's standard limited "repair or replace" warranties. Under these warranties, the *exclusive* remedy is free-of-charge repair of defects in materials and workmanship upon presentation of the vehicle to an authorized dealer within the warranty period. *See* Request for Judicial Notice, Exhibit D. All other remedies are specifically excluded.

It comes as no surprise, therefore, that plaintiff admits he is not suing GM for breach of express warranty, *see* Opp., p. 5, despite alleging that GM "refused to cover the problem under warranty, as it was required to do under the [ARMSPA]." *See* FAC, ¶¶ 13-14, 45, 57, 60. Instead of seeking free repairs under the warranty, plaintiff seems to have made the tactical choice to allege that the standard limited warranty *does not* cover water leaks because lack of warranty coverage is an essential predicate for his MVWAP claim that in those circumstances in which GM dealers did provide free repairs for water leaks, they did so in alleged compliance with a MVWAP "adjustment program" which Old GM allegedly created by "enlarging" the warranty. *See* Opp., p. 11.

C. New GM Did Not Assume Any Other Relevant Liabilities

1. CLRA and UCL Claims

Vehicle manufacturers are subject to a variety of legal claims based on their manufacture and distribution of new vehicles to their dealers for sale or lease to retail customers. These include not only strict product liability claims for personal injury or property damage and claims for breach of standard vehicle warranties, all of which New GM specifically agreed to assume, but also other types of claims including breach of implied warranties and warranties-by-description, claims of common law misrepresentation and omission, and claims for violation of state consumer laws such as California's CLRA, UCL and MVWAP statutes. The ARMSPA conspicuously excluded the latter group of claims.

Because New GM did not manufacture plaintiff's Chevrolet Equinox – or *any* Equinoxes or Pontiac Torrents – it is not liable on any of these types of claims *unless* it specifically agreed to assume such liability. Because plaintiff's CLRA, UCL and MVWAP do not fall within any of the Assumed Liability categories set out in ARMSPA § 2.3(a), New GM, very simply, has no liability to plaintiff because it did not manufacture or distribute his vehicle and therefore, unlike Old GM, is not subject to these types of claims.

Bolstering this conclusion, ARMSPA § 2.3(b)(xvi) explicitly excludes from the liabilities assumed by New GM "all Liabilities arising out of, related to or in connection with any (A) implied warranty ***or other implied obligation arising under statutory*** or common ***law*** without the necessity of an express warranty or (b) allegation, statement or writing by or attributable to [Old GM]." ARMSPA (emphasis added).[2]

[2] To be sure, plaintiff argues that his claims do not fit within this exclusion because, he claims, he is suing on express rather than implied obligations. But plaintiff's statement that his claims involve "*express* obligations" that "transcend the law of warranty" confirms that these claims regardless of whether they fit within the exclusion do not fit within the section 2.3(a)(vii)(A) definition of assumed warranty liabilities because they *transcend* – i.e., are outside the bounds of – warranty law. Opp., p. 8, n. 6 (quoted emphasis in original).

Further, paragraph 46 of the Sale Approval Order provides that "[e]xcept for the Assumed Liabilities expressly set forth in the [ARMSPA] … [New GM] … shall [not] have any liability for any claim that arose prior to the Closing Date***, relates to the production of vehicles prior to the Closing Date***, or otherwise is assertable against [Old GM] … prior to the Closing Date…." Claims for non-disclosure of an alleged design defect clearly "relate to the production of vehicles prior to the Closing Date" and therefore fall squarely within the ambit of this prohibitory language. And, if there were any reason for doubt, the next sentence of paragraph 46 clearly puts to rest any conceivable claim that New GM has liability based on Old GM's failure to disclose the alleged defect:

> "***Without limiting the foregoing, [New GM] shall not have any successor, transferee, derivative, or vicarious liabilities of any kind or character for any claims, including, but not limited to, under any theory of*** successor or transferee liability, de facto merger or continuity … and ***products … liability***, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated."

Based on plaintiff's allegations (which New GM does not admit), as of the Closing Date he asserts that he had an unasserted "products liability" claim against Old GM for alleged non-disclosure of the claimed design defect. Under the quoted language, however, New GM clearly has no successor or transferee liability based on Old GM's failure to disclose the alleged defect.

Plaintiff not only has no "products liability" or "warranty" claim, but he is subject to a Bankruptcy Court injunction prohibiting him from making such claims against New GM. Sale Approval Order, ¶ 47 ("Effective upon the Closing …all persons and entities ***are forever prohibited and enjoined from commencing or continuing in any manner any action … against [New GM] …with respect to any (i) claim against [Old GM] other than Assumed Liabilities***) (emphasis added).

To be sure, plaintiff argues that New GM is liable on his statutory claims because it has "continued" Old GM's misconduct. This argument is circular, however, because it assumes incorrectly that New GM has the same obligations and liabilities as Old GM, the manufacturer of plaintiff's vehicle. It does not. Because it did not manufacture Chevrolet Equinoxes or Pontiac Torrents, New GM *does not* have normal manufacturer liabilities. Instead, the only source of potential liability to plaintiff on the part of New GM is the ARMSPA, so any liabilities to plaintiff other than those set forth in section 2.3(a) belong to Old GM.

Further, plaintiff's argument that New GM allegedly learned of the claimed water leak defect when it purchased Old GM's assets in July 2009, and therefore was obliged under the CLRA and UCL to disclose the claimed defect to plaintiff, is missing an essential element. At the time that the section 363 transaction closed on July 10, 2009, New GM had no relationship with plaintiff *except* for its agreement to perform Old GM's obligations under its standard express warranty.

If, as plaintiff apparently believes, Old GM knew of the alleged defect and failed to make required disclosures, plaintiff at the time that the section 363 transaction closed *already had an actionable claim against Old GM that was ripe for adjudication*. But New GM did not have any liability as the vehicle's manufacturer and under the ARMSPA it did not agree to assume Old GM's liability for alleged non-disclosure, which accordingly remains with Old GM. Thus, plaintiff's nondisclosure claim against New GM reduces to a naked attempt to impose successor or transferee liability – a result which paragraph 46 of the Sale Approval Order explicitly forbids. And, again, any arguments to the contrary must be made to the Court which entered that order, the Bankruptcy Court for the Southern District of New York.

2. MVWAP Claims

Virtually the same analysis applies to plaintiff's MVWAP claims. MVWAP provides that *the manufacturer* of a vehicle (here, Old GM) cannot expand or

extend coverage under its standard warranty, except on an *ad hoc* basis, without notifying all vehicle owners of the availability of the expanded coverage and reimbursing owners who already have paid for repairs of the "condition" that is the subject of the alleged "adjustment program." Civ. Code §§ 1795.90(d), 1795.92. The basis for plaintiff's MVWAP claim in this case are two versions of a Technical Service Bulletin issued by Old GM which describes how to diagnose and remedy water leak problems *but which says absolutely nothing about whether repair of these problems is covered under the warranty or, if not, whether the repairs should be provided to customers free-of-charge.*

While New GM believes that these Technical Service Bulletins *did not* create any "adjustment program" within the meaning of Civ. Code § 1795.90(d), the important point here is that the MVWAP violation, if there was one, was complete at the time these bulletins were adopted in October 2008 and January 2009, *before the Old GM bankruptcy filing*. In other words, if there was an obligation under MVWAP to provide statutory notice to Equinox and Torrent owners of a claimed defect which, obviously, "relate[d] to the production of vehicles prior to the Closing Date" (*see* Sale Approval Order, ¶ 46), Old GM had that obligation and had breached it long before New GM negotiated to purchase its assets. Because New GM did not manufacture these vehicles, and did not assume MVWAP liability for them in the ARMSPA,[3] it could only have MVWAP liability as a successor or transferee. But ARMSPA and the Sale Approval Order expressly protect New GM from such liability. *See id.*

Plaintiff also makes a spurious claim that New GM expressly assumed liability under MVWAP because this statute allegedly is "similar" to the National

[3] Plaintiff does not and cannot argue that a violation of MVWAP falls within New GM's assumed warranty liability under section 2.3(a)(vii)(A) since, by definition, providing coverage which *expands* or *enlarges* the limited coverage provided by the standard express warranty is not coverage that "arises out of" that warranty. *See also* Sale Approval Order, ¶ 56 ("[New GM] is assuming the obligations of [Old GM] pursuant to and subject to conditions and limitations contained in their express written warranties….").

Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq*. (the "Safety Act"). To be sure, ARMSPA § 6.15(a) and the Sale Approval Order (¶ 17) provide that New GM after the Closing Date "shall comply with the *certification, reporting and recall requirements* of the National Traffic and Motor Vehicle Safety Act … and similar Laws … to the extent applicable in respect of vehicles and vehicle parts manufactured and distributed by [Old GM]" (emphasis added).

Consistent with the emphasized language, however, the Safety Act is only a certification, reporting and recall statute, not a consumer disclosure statute. It requires manufacturers to certify compliance with safety standards before marketing vehicles to the public. 49 U.S.C. §§ 30111, 30112, 30115. It directs the National Highway & Traffic Safety Administration to investigate safety issues and, if necessary, order vehicle recall campaigns. 49 U.S.C. §§ 30118-20, 30163.

But the Safety Act *does not* require manufacturers like GM to notify retail customers when it issues a Technical Service Bulletin or to provide repairs *unless there is a recall*. And by quite carefully limiting the obligation in question to "certification, reporting and recall requirements," the drafters of the ARMSPA made it quite clear that New GM was not assuming responsibility for claims like those plaintiff is asserting here.

In marked contrast to the Safety Act, MVWAP is not a safety certification or recall statute; instead, it requires consumer notification and, sometimes, repair reimbursement, if and when a manufacturer creates an "adjustment program" *whether or not there is a recall or, indeed, any safety issue at all*.

Thus, the Safety Act and MVWAP are in no sense "similar Laws" and New GM therefore cannot be held to have assumed MVWAP liabilities under ARMSPA § 6.15(a) or paragraph 17 of the Sale Approval Order. And, once again, if there is even a smidgen of doubt, the issue falls squarely within Judge Gerber's exclusive jurisdiction to determine what liabilities New GM agreed to assume under these provisions.

III. THE BANKRUPTCY COURT HAS "CORE" JURISDICTION

The authorities cited in the moving papers (pp. 11-13), show that the Bankruptcy Court has "core" jurisdiction to enforce, interpret and resolve disputes concerning sales free and clear of liens under section 363 of the Bankruptcy Court. Judge Gerber in his Rally decision bolstered this conclusion with still more citations that directly address this point:

> "… I find that this is a core matter. Under 28 U.S.C., Section 157(a)(2)(n), core matters include, with exceptions not relevant here, orders approving the sale of property. The 363 sale order and my approval of the wind-down agreement documented the outcome of those core proceedings. And a proceeding such as the motion now before me which seeks relief predicated on a 'retained jurisdiction' clause in my order resolving a core matter is a core matter as well. The decision in Eveleth Mines, 312 B.R. at pages 644 to 645 is directly on point…. The Second Circuit has held similarly. It's held that bankruptcy courts are empowered to enforce the sale order that they enter and to protect the rights which were established by the sale order. See Millenium Seacarriers, 419 F.3d at 97; and Petrie Retail, 304 F.3d at 229-30.[4] Petrie Retail is particularly instructive because it also dealt with a dispute between two nondebtors addressing rights that were created by the sale order…."

Transcript of Hearing, October 4, 2010, pp. 46-47.[5]

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[4] Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.), 419 F.3d 93 (2d Cir.2005); Luan Investment S.E. v. Franklin 145 Corp. (In re Petrie Retail), 304 F.3d 223 (2d Cir.2002)

[5] Plaintiff feebly attempts to distinguish Eveleth Mines on the grounds that one of the litigants initially had consented to Bankruptcy Court jurisdiction but then sought to withdraw its consent. Opp., pp. 20-21. But it is the most fundamental principle of federal jurisdiction that the same cannot be created by consent. And the two Second Circuit decisions certainly dispatch any claim that interpretation of a bankruptcy court's "core" order is not itself a core matter.

The two Winn decisions attached as Exhibits to plaintiff's Opposition do not support any contrary conclusion. Each involved purely state law issues between non-diverse parties as to which bankruptcy issues arose only by way of defense. The district court's remand for lack of federal question jurisdiction has no relevance in this case, where the plaintiff is directly asserting against New GM claims on obligations that remain with the bankrupt, Old GM, in direct violation of paragraph 47 of the Sale Approval Order issued by Judge Gerber.

IV. THE ALTERNATIVE TRANSFER MOTION IS MERITORIOUS

If for any reason the Court is not satisfied that it lacks subject matter jurisdiction as a consequence of the Bankruptcy Court's retention of *exclusive* jurisdiction in the Sale Approval Order, New GM respectfully submits that for the reasons stated in the moving papers, the action should be transferred under 28 U.S.C. § 1412 for referral to the Bankruptcy Court under 28 U.S.C. § 157(b), consistent with the Bankruptcy Court's indisputable "core" jurisdiction concerning the section 363 transaction.

CONCLUSION

For all the reasons stated, defendant General Motors LLC respectfully urges that this Court grant its motion to dismiss this action for lack of subject matter jurisdiction or, in the alternative, transfer the action pursuant to 28 U.S.C. § 1412 to the United States District Court for the Southern District of New York for referral to the Bankruptcy Court pursuant to 28 U.S.C. § 157(b).

Dated: October 11, 2010

GREGORY R. OXFORD
ISAACS CLOUSE CROSE & OXFORD LLP

By: *[s] Gregory R. Oxford*
Gregory R. Oxford
Attorneys for Defendant
General Motors LLC

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026-reg

- -x

In the Matter of:

MOTORS LIQUIDATION COMPANY, et al.

f/k/a General Motors Corporation, et al.,

Debtors.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 4, 2010

3:06 PM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce 363 Sale Order and Approved Deferred Termination (Wind-Down) Agreement

Transcribed by: Lisa Bar-Leib

A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Debtors and Debtors-in-Possession
767 Fifth Avenue
New York, NY 10153

BY: EVAN S. LEDERMAN, ESQ.

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for the Official Committee of Unsecured Creditors
1177 Avenue of the Americas
New York, NY 10036

BY: JENNIFER SHARRET, ESQ.
(TELEPHONICALLY)

KING & SPALDING LLP
Attorneys for General Motors LLC a/k/a New GM
1185 Avenue of the Americas
New York, NY 10036

BY: ARTHUR J. STEINBERG, ESQ.
SCOTT DAVIDSON, ESQ.

ISAACS CLOUSE CROSE & OXFORD LLP
Attorneys for General Motors LLC a/k/a New GM
21515 Hawthorne Boulevard
Suite 950
Torrance, CA 90503

BY: GREGORY R. OXFORD, ESQ.
(TELEPHONICALLY)

WILK AUSLANDER LLP
Attorneys for Rally Auto Group Inc.
675 Third Avenue
New York, NY 10017

BY: ERIC J. SNYDER, ESQ.

BELLAVIA GENTILE & ASSOCIATES, LLP
Attorneys for Rally Auto Group Inc.
200 Old Country Road
Mineola, NY 11501

BY: STEVEN H. BLATT, ESQ.

MORGANSTERN, MACADAMS & DEVITO CO., L.P.A.
Attorneys for Rally Auto Group Inc.
636 West St. Clair Avenue
Cleveland, OH 44113

BY: CHRISTOPHER M. DEVITO, ESQ.
(TELEPHONICALLY)

U.S. DEPARTMENT OF JUSTICE
U.S. Attorney's Office
Southern District of New York
86 Chambers Street
New York, NY 10007

BY: DAVID S. JONES, DEPUTY CHIEF, CIVIL DIVISION

P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning -- or afternoon. Have seats, please. All right. GM. Motors Liquidation Company. Rally Motors. Mr. Lederman, do we have some preliminary matters that I had become unaware of?

MR. LEDERMAN: No, Your Honor, we don't. The only matter before you is a matter that you just introduced. So I was just going to introduce the parties and turn over the lectern to them.

THE COURT: All right. Well, I know Mr. Steinberg and Mr. Snyder. Why don't the remainder of you folks introduce yourselves.

MR. DAVIDSON: Scott Davidson from King & Spalding --

THE COURT: All right.

MR. DAVIDSON: -- for New GM.

MR. OXFORD (TELEPHONICALLY): Greg Oxford, Isaac Clouse --

MR. BLATT: Steven Blatt from Bellavia --

THE COURT: Just a minute, please. First, I need the folks in the courtroom to introduce themselves.

MR. OXFORD: Okay, Your Honor.

THE COURT: And then if people are on the phone, I'm going to have to ask that they defer to people in the courtroom unless people in the courtroom hand off to them.

MR. BLATT: Steve --

THE COURT: All right. Just a minute, please, gentlemen.

MR. BLATT: Yes, Your Honor.

THE COURT: All right. With Mr. Snyder?

MR. BLATT: Yes.

MR. SNYDER: Yes, Your Honor. I'm sorry. Go ahead.

MR. BLATT: Steven Blatt, Bellavia Gentile, 200 Old Country Road, Mineola, New York, on behalf of Rally Auto Group.

THE COURT: Right, Mr. Blatt. Okay.

THE COURT: Now, is there a gentleman on the phone who wanted to introduce himself?

MR. OXFORD: Yes, Your Honor. It's Greg Oxford, Isaac Clouse Crose & Oxford also appearing with Mr. Steinberg on behalf of General Motors LLC.

THE COURT: All right, Mr. Oxford. Okay. Gentlemen, make your presentations as you see fit. But I'm going to need you to address the following needs and concerns. But first, let me lay on my frustration with you guys, both sides. I cannot, for the life of me, understand, Mr. Snyder and Mr. Blatt, why you can't follow the requirements of my case management orders and give me a table of cases and table of authorities as those rules require in baby talk. When I'm trying to compare the two submissions and see what you guys said about a particular case or, for that matter, how you

organized your arguments, that is a source of incredible difficulty and frustration for me. And, Mr. Steinberg and Mr. Oxford -- Mr. Oxford, I think you at least have been in this case before. How many times have I said that I don't want to use -- see the word "passum" especially when it refers to the most important case in your whole brief on a lot of these issues? I'm not expecting a response now. You can address it when it's your turn.

Gentlemen -- Mr. Snyder and Mr. Blatt, if you want to make your subject matter jurisdictions, you can, but it doesn't seem to me that this is about subject matter jurisdiction in any way, shape or form. Frankly, I think you missed the boat when you were talking about related-to jurisdiction. It seems to me that this is a poster child for arising-in jurisdiction and the principle that bankruptcy judges have the authority to enforce their own orders. And when an agreement says that the bankruptcy court will have exclusive jurisdiction to deal with a particular matter and then the order implements that, I have some trouble seeing how it can be to the contrary. If you nevertheless want to continue to the contrary, you got to help me with Petrie Retail and Millenium Seacarriers on those points.

Now, I sense that both sides agree that there is no right of judicial review under the Dealer Arbitration Act and that the Federal Arbitration Act applies only to contractual

agreements to arbitrate. So therefore, we're on a little bit of -- or totally implied remedies if and to the extent they exist. Now, Mr. Steinberg, I want to see whether your argument proves too much. And you can help me with that if I posit to you a situation where the arbitrator is taking bribes or he's taking an ex parte communication because my belly would tell me that even if there weren't an expressed right of judicial review in that situation that Rally Motors, if it were on the losing end of that type of situation and, of course, if it came to me, could come and say, Judge, I need relief from that kind of thing. But, of course, Mr. Snyder and Mr. Blatt, that isn't what you're alleging here. In essence, you're alleging that the arbitrator made an error of law. And you haven't shown me any case in which the arbitrator was told that he had to deal with these franchise agreements double or nothing. And it strikes me as a garden variety claim of legal error. So help me if I'm wrong on that.

Now, I don't know how many times I and the other bankruptcy judges in this district have had 363 orders and confirmation orders provide for continuing jurisdiction typically to follow up on the implementation of things that were in the sale order and in the plan or agreements that were provided under either. Counterparties come into the court all the time putting their money on the line to get benefits by dealing with the bankruptcy court. And that's an important

reason, as at least one of the cases that was quoted to me says, why we have provisions of this character. And I need your help in understanding why I should say "Never mind" to provisions of that type. But if there is authority for some kind of implied judicial review that I, in contrast to a district judge exercising diversity jurisdiction, could issue, or even if it were deemed to be 1331 federal question jurisdiction -- though I don't see the provision of the U.S.C. under which the federal right arises. I mean, I see why you could compel GM to arbitrate but New GM didn't quarrel with your right to arbitrate that I need help on that.

So, Mr. Snyder, will it be you or Mr. Blatt?

MR. SNYDER: It'll be me, Your Honor.

THE COURT: Okay.

(Pause)

MR. SNYDER: Your Honor, as I think the analogy for our purposes or the point where we start is the AAA commercial rules. And I focus on those, Your Honor, only because, as the Court pointed out, I don't think anyone disputes that when both parties sat down to the arbitration that the commercial rules apply. Now, GM states that it objected to the use of the commercial rules. But be that as it may, the scheduling order, in particular, paragraph 1, which is annexed to our objection as Exhibit F, specifically states that the commercial rules apply. And one of those rules, Your Honor, is 48(c) which we

relied on extensively in our papers but it states, and I quote -- it's short: "Parties to an arbitration under this rule shall be deemed to have consented. A judgment upon the arbitration award may be entered into any federal, state or court of competent jurisdiction." Now it doesn't say they have to agree. It says that they've deemed to have consented. And so our argument is, Your Honor, that if the AAA commercial rules apply and GM is deemed to have consented then, naturally, there is a -- the arbitration award is final and binding and there has to be a right of judicial review under the terms of 48(c). Now we cited to the Idea Nuova case for the proposition that although that was a contract case, where the contract is silent as to whether the rights of judicial review apply, the Courts will impute 48(c) not because the parties agreed to arbitrate, Your Honor, but because by going forward with the arbitration, because the commercial rules themselves apply, they're deemed to have consented to both the arbitration and the entry of a final judgment. And, Your Honor, that's based solely on facts that are not in dispute.

THE COURT: Mr. Oxford, do you want to mute your phone, please?

MR. OXFORD: I'm not sure I know how to do that. We could --

THE COURT: All right. CourtCall, mute them. Go ahead, Mr. Snyder.

MR. OXFORD: I didn't hear you, Your Honor. I'm sorry.

THE COURT: I'm telling CourtCall to mute you, Mr. Oxford. Go ahead, Mr. Snyder.

MR. SNYDER: Thank you, Your Honor. Now we agree, Your Honor, as GM has pointed out that the Dealer Arbitration Act is silent as to judicial review. But we contend in addition to the AAA commercial rules giving the federal court subject matter jurisdiction that, as Your Honor pointed out, that if a federal question presents itself under 28 U.S.C. 1331 then the California district court can rely on that federal question to possess subject matter jurisdiction. And that federal question is presented here, to wit. Is the removal of a Chevrolet brand the granting of a "covered dealership" as that term is defined under 747(a) and (d)? It's stated specifically, Your Honor, in Rally's statement. Does the removal of a Chevrolet brand constitute a "covered dealership"? So we have a federal statute that Rally is asking a federal court to interpret and we have the Vaden case which I cite to at -- and -- 129 S. Ct. 1262. In that case, the Supreme Court held that a federal court could look through the arbitration, Your Honor, to determine whether the controversy in question arises under the federal law so that the court has federal question jurisdiction. That's all we're asking the federal court to do. Interpret a federal statute on a federal

question.

And in addition, Your Honor, we believe the federal court has jurisdiction for the issue that Your Honor has raised and is the most troubling, at least to me, that there is no right to judicial review. GM doesn't cite to any federal statute, while may be silent or limited, that did not allow for judicial review. Which goes right to the due process argument and the constitutionality of the statute itself.

Your Honor, the arbitrator didn't have to take bribes. Let's just say we end this hearing and regardless of what happens GM says, I'm not reinstating you. I don't care what Judge Gerber says or anyone else says.

THE COURT: Well, isn't that the easier case because wouldn't you, Mr. Snyder, be able to come back to me in about ten minutes and say that New GM isn't complying with the arbitration award? And to the extent that I understood your 48(c) argument, the language is "deemed to have consented to enforcement". And if you say -- let's take what I understand to be the case. You won three-quarters of -- or your client won three-quarters of the arbitration before the arbitrator. And suppose GM stiffs you on those three-quarters where you prevailed -- your client prevailed. I would have thought -- and maybe Mr. Steinberg should be heard on this because if he contends to the contrary, I guess I should know it. But I would have thought that you could come back to me and say make

GM -- New GM comply with the arbitrator's award. But you're not trying to enforce the arbitrator's award. You're trying to attack it. You're trying to attack the one-quarter of it you don't like.

MR. SNYDER: Your Honor, we're trying to say that if there is judicial review of a statute that does not allow for judicial review that the constitutionality of the statute, the due process argument is the district court possesses jurisdiction to that. There's a crucial difference, Your Honor -- and to me, this is the crux of our argument. Putting the core related and Petrie aside for the moment, whether this Court has jurisdiction or not is to me not the issue. The issue is whether the California court has jurisdiction. What GM is saying is this Court has sole and exclusive jurisdiction. That means of the 600 dealers that had their claims arbitrated with GM, if they are unhappy with a portion of the award then all 600 nondebtors with New GM, a nondebtor, that this Court has sole and exclusive jurisdiction to determine under the Federal Arbitration Act what a covered dealership is. And I'm suggesting that the California district court, whether as a federal question or for constitutionality purposes, might also have that jurisdiction because it can't be that as a result of the wind-down agreements, when the Dealer Arbitration Act was passed that the Court was willing to say we're going to pass the Dealer Arbitration Act to give you dealers another bite at

the apple. But you have to go back to the bankruptcy court if you want it enforced. Now maybe this Court does have related-to jurisdiction but it couldn't be, Your Honor, that there is no right of judicial review and Congress' intent was that everybody has to come back here. And that's --

THE COURT: I don't want to interpret you, Mr. Snyder, but it wasn't related-to jurisdiction that I think is in play here. I think it's arising-in jurisdiction, the second of the three prongs under 1334.

MR. SNYDER: Understood, Your Honor. And again, even if this Court has arising-to jurisdiction, that is not what we're arguing. They are arguing -- and remember, Your Honor, the motion seeks to compel us to withdraw a lawsuit in federal court because the district court does not have jurisdiction. And I think for the three reasons I've stated, the plain language of 48(c), the introduction of a federal question and the constitutionality of a law that does not allow for judicial review, gives the California district court jurisdiction. It's not to say that this Court doesn't have jurisdiction but we didn't start in this court. We started in the federal court in California. They filed an answer. They didn't move to dismiss. And then three days later, they filed the motion here. Not by order to show cause because they were so concerned about the California's court jurisdiction but by regular motion. The -- we, in deference to this Court, didn't

go into the California court to seek a stay. We told them that we would come here and explain to this Court why the Court, the California court, has federal court jurisdiction. They don't reply to our arguments about Vaden and the ability of a federal court to go through -- look through an arbitration. The decision is powerful, Your Honor, to the extent it allows you to look through the arbitration and see if a federal question is presented. That's our issue, that federal questions are presented, constitutionality presented. Normally not an issue but in a case where a statute is silent as to the right of judicial review, the implication or the logical extension of their argument is that everybody has to come back here. And it is submitted, Your Honor, that that's not what Congress intended by leaving the statute silent. We believe what they intended is that the arbitration rules will allow the dealer, the aggrieved dealer, to go into a court of competent jurisdiction to get the relief they seek.

And although the judicial estoppel argument has gone up and back, Your Honor, in their complaint, in paragraph 3 in the Santa Monica case, they don't just rely on diversity when they seek to compel Santa Monica to execute the settlement agreement. They rely on 28 U.S.C. 1331 to get the district court's attention. They rely on the Dealer Arbitration Act to get the Court to execute -- to restrain Santa Monica. Then they come here and say this Court has sole and exclusive

jurisdiction with respect to matters in the Dealer Arbitration Act. They didn't come here, Your Honor, when Santa Monica sought to exercise jurisdiction and refused to sign that settlement agreement. They went to the California district court. And so, to argue that sole and exclusive jurisdiction sits here but to rely on federal jurisdiction not just diversity, 28 U.S.C. 1331 jurisdiction in California, to me, rises to the level of judicial estop.

The last argument, Your Honor, which was the first one you raised, is the applicability of Petrie and the ability of the Court to enforce its orders. And there's no doubt that buyers have expectations and they want this Court to enforce them and they have a right to come in here and seek that. But they have -- every provision of the wind-down agreement that they have pointed to, other than the covenant to sue, is not being implicated. We were able to sue, commence an arbitration, because the Dealer Arbitration Act allowed us to. They actually state in their papers that us going into California district court violated the covenant to sue. Well, how can that be? How can that be that the statute allows us to go to Califor -- and commence an arbitration but doesn't allow it to enforce it anywhere?

The wind-down agreement is still the wind-down agreement. The dealer, Rally, and the other 600 dealers still have certain obligations that they need to fulfill by October

31st. But the covenant not to sue is not one of them because the statute that was codified in December 2009 gave the dealer certain rights. And they are limited rights. They're not happy with the outcome. Rally believes that the definition of covered dealer was inappropriately misinterpreted by the arbitrator. There is nothing in the wind-down agreement or the 363 order, Your Honor, that suggests they would have to come back here for that.

Now, it's unfortunate that the statute is silent. But issues of due process and federal question as well as the AAA rules allow Rally to go into court in California to redress those arguments. That's our position. Again, we're not suggesting or it's minimally relevant that this Court has jurisdiction. Our question is does the California court have jurisdiction. GM thought it did under 28 U.S.C. 1331. So do we. And that's the reason we object to them saying this Court has sole and exclusive jurisdiction under the wind-down agreements as if the Dealer Arbitration Act didn't exist.

THE COURT: Well, you hit on something that I'm glad you did, Mr. Snyder, because I want both you and Mr. Steinberg to address it when it's your respective turns. And, of course, it's your turn now. I would have thought that the Dealer Arbitration Act trumps my order and the wind-down agreements to the extent they're inconsistent. But that the duty of any Court is to try to construe them together to achieve harmony

between them so there is the minimal clashing between the two and that where, of course, the later Dealer Arbitration Act speaks to something, it controls over my order but only to that extent. Do you think I'm off base from that?

MR. SNYDER: I do not, Your Honor.

THE COURT: All right. Keep going.

MR. SNYDER: And, Your Honor, I or Rally do not see the ability to confirm a judgment, as that term is defined in 48(c), or if the district court should allow, modify or vacate the judgment under the commercial arbitration rules as being anything other than an extension of the arbitration which was codified in the Dealer Arbitration Act. It isn't a violation of the covenant not to sue under the wind-down agreements because under the wind-down agreements in July 2009, this was not a sparkle in anybody's eye. No one knew what Congress would end up doing six months later. They're looking to prohibit us from doing something that wasn't even contemplated at the time Your Honor entered that order. This came six months later. And so the rules changed partially. I'm not suggesting the wind-down agreements are -- they say aggregated -- none of that. But the covenant to sue was. And they were allowed to commence arbitrations against New GM in order to get rights back, thumbs up or thumbs down.

THE COURT: Do you think it covers all covenants or all suits or can you harmonize them by saying that if you win

in the arbitrations that Congress has now given you, of course you have the right to enforce that if your opponent, which in this case is New GM, is so dumb as to try to welsh on the arbitrator's ruling. But that's really how they -- separate provisions are best read together.

MR. SNYDER: Your Honor, there's a reason why -- you call it dumb, but there's a reason why the fifty states and every federal statute except this one that I've seen has the right of judicial review. It's because if there is no enforcement of a final or binding arbitration then the other side could say, ha, forget it, I'm not doing anything 'cause you have no place to go.

THE COURT: Again, I remain troubled by the distinction between enforcing the award which my tentative, California style subject to your opponent's right to be heard, is that if New GM hadn't complied with the arbitrator's award, I would make it, and to attack the arbitrator's award which invokes separate policy considerations.

MR. SNYDER: Well, Your Honor, I would say that it seems as if the rules which required findings of fact were set up for judicial review. If the arbitrator had simply said, Your Honor, we're ruling against Rally because I know Larry Mayle, the president, and I don't like him, where could we go? If the Court is suggesting if that was the ruling that we could go into this court to overturn or vacate an arbitration for

manifest disregard of fact and law out of an arbitration coming out of the Dealer Arbitration Act, I don't see it. I see it as being a federal question that allows judicial review for manifest disregard of facts and law through a federal court. That's what the Supreme Court said in Vaden, that you can look through the arbitration to see if a federal question exists. GM doesn't even cite to Vaden in their reply brief. But that is uniquely a federal question. Is Chevy a covered brand as that term is defined under 747(a) and (d)? What could be more of a federal question than citing to the statute itself. This is not an abstract referral, Your Honor, where Rally was trying to get around state jurisdiction. This is questioning the words of a federal statute. And Rally would have never thought to come to this court, Your Honor, as a result of an arbitration to enforce or to ask this Court to make findings of fact as to whether Chevy is a covered dealership as that term is defined under 747(a) because although this Court might have jurisdiction, the California court certainly has jurisdiction.

And, Your Honor, that's what we see as the difference. When I speak about losing or diminishing jurisdiction in the sales process, I'm not suggesting that buyers can't come back to get the benefit of their bargain. But this was not the benefit of anybody's bargain because the Dealer Arbitration Act wasn't even in existence at the time. They couldn't have said we want this statute because we want no

judicial review from the dealers. What are you talking about? There's no right to review anyway. There's a covenant to not to sue. The Dealer Arbitration Act hadn't even been introduced yet. So they can't say they didn't get their expectation 'cause there was no expectation. This was six months later. So I don't see this as an enforcement of an order 'cause there was no expectation that they would have that right.

(Pause)

THE COURT: Okay. Mr. Snyder, I'm going to give you a chance to reply but is this a good time to hear from Mr. Steinberg?

MR. SNYDER: Yes, Your Honor. Thank you.

THE COURT: Thank you.

(Pause)

MR. STEINBERG: Good afternoon, Your Honor. I think Your Honor's questions were very incisive and I will try to answer them as best as I can and to try to point out why I think my colleague has not fully answered Your Honor's inquiry. I think Your Honor is correct that the real issue here is there was a wind-down agreement. Your Honor approved the wind-down agreement that was part of the sale process. And then subsequently, Congress acted under the Dealer Arbitration Act. So how do you mesh what you had done versus the later congressional statute?

And I think it's important to distinguish what does

the Dealer Arbitration Act do and what it specifically did not do. And the thing that it did, and I think my colleague has agreed with this, is it provided dealers who either signed the wind-down agreements or had their dealership agreements rejected in either the Chrysler or General Motors cases a new right created by a federal statute to be reinstated to the dealer network of the debtor or the purchaser of the debtor's assets. And in order to avail themselves of that right, they had to file timely notices in accordance with the Dealer Arbitration Act for binding arbitration. And I think my colleague was correct. It was either up or down. Either you're reinstated or you're not reinstated. And the Dealer Arbitration Act told arbitrators they had seven factors, nonexclusive, to take a look at for purposes of making that determination. And there was specific and very, very tight deadlines that were put in for the arbitration. You had to act to ask for arbitration within forty days. You had six months to complete the arbitration. The arbitrator had seven days to make its ruling and that everything had to be done by July 14th because the legislative intent of the statute which was to try to create what Congress thought was a better balance between the rights of dealers and the rights of the manufacturers, the legislative intent was we need to have a streamlined process that would not otherwise get bogged down with discovery or litigation. We both quote -- at least our reply quotes from

the legislative history to the statute which is fairly sparse. But the legislative history refers to the need to have something streamlined and quick and the statute does not provide for judicial review unlike the Federal Arbitration Act in Section 9, 10, 11 and 12. There are specific provisions which talk about what a Court can do or not do in connection with something that is governed by the FAA. This clearly is not governed by the FAA. The FAA governs agreements where the parties had agreed to arbitrate. This was not one of those situations. This was a case where Congress had imposed the obligation or the right for the dealer to seek arbitration under specific circumstances but it wasn't a contractual obligation that the parties had bargained for. So the FAA, which is leadered (sic), the cases relating to the FAA, the judicial review relating to an FAA, which my adversary recites in his papers, they really have no relevance here. And I think Your Honor was right. There is no judicial review. And that was, I think, intentional. And I think my adversary says where is it that you can never get judicial review? You know, Congress passes a statute not -- imposing a new right and then says that's -- we'll have a procedure to implement that statute and that's it. And there's no more judicial review.

THE COURT: Well, pause, Mr. Steinberg, because I'm wondering if that proves too much. Suppose the arbitrator's taking bribes. And suppose the forum is this court and the

dealer's been victimized by the arbitrator taking bribes. You're telling me that I can't look at that?

MR. STEINBERG: I'm not sure if the right remedy would have been to go to the AAA and say that there was an invalid arbitration and seek the remedy there to invalidate the results of the arbitration. But --

THE COURT: So you're going to take that and -- bring it down and give it to the marshals and then you can return to the courtroom.

MR. STEINBERG: But I will say, Your Honor, that the hypothetical that you posed which is that if there was a violation of what Congress had enacted because they had bribed the arbiter of the resolution, it would seem to me that there needs to be some kind of review. And maybe it would be Your Honor who has the review. I'm not sure whether it would be the AAA that would review it. But it would seem to me in a bribe circumstance that that would be the case.

But I think critical for what my adversary has argued which is that he's raised the potential for the constitutionality of the Dealer Arbitration Act because there is no judicial review, I don't know where that argument goes for him because the Dealer Arbitration Act was a right given to the dealers to potentially seek reinstatement. If you declare the statute unconstitutional then they don't have that right. If he's asking you to put in to the statute that which doesn't

exist which is to, in effect, write the judicial review section when Congress didn't write it, I don't think Your Honor has the ability to do that.

And I don't think -- you know, they spend ten pages of their brief saying how we didn't comply with provisions that is the judicial standard under the Federal Arbitration Act. And I would say to Your Honor that that's irrelevant because that's not -- there is no standard of judicial review. And you can't pick something from another statute and say that's what I'm going to use here in order to make it constitutional.

Now, there is situations where Congress has given a right to a party and there is no judicial review. We cited in our papers the Switchmen case which was actually quoted in Thomas. And we specifically highlighted the language which said that "A review by the federal district court of the board's determination is not necessary to preserve or protect that right." Congress, for its reasons on its own, decided upon the protection of the right which it created. And if you look at Thomas itself, they talked about the concept of where Congress has written legislation where it asked an agency to make a decision. And the issue was if the agency did something wrong, can it get judicial review. And there are certain statutes that provide that there is no judicial review. So the Thomas case when it was written referred to Medicare reimbursement and said that an agency's review relating to

Medicare reimbursement is not subject to judicial review. So --

THE COURT: And Switchmen dealt with the Railway Labor Act?

MR. STEINBERG: Yes.

THE COURT: And it was at least Thomas that was the use of your "passum" if I recall.

MR. STEINBERG: Yes. And I apologize for that, Your Honor.

So we have a situation here where there was a legislative reason why things were done on a streamlined basis. There is no language that talks about judicial review and there is no issue I believe relating to constitutionality. But if it is, I don't think it gets them anywhere. And it was nice that they made this a central part of their oral argument when it was relegated to a footnote in their brief which -- without any real challenge other than just a throw-away that they question whether it could be constitutional if there's no judicial review.

Your Honor --

THE COURT: At least it got your attention enough for you to cover it from pages 8 through 10 of your reply.

MR. STEINBERG: Yes, Your Honor, because I did think it was an important issue and that Your Honor would want the benefit of some briefing. But I did not think that that was

the center of the argument.

Similarly, you'll notice how their argument is morphed because their papers said Your Honor didn't have jurisdiction, didn't have core jurisdiction, didn't have related jurisdiction, asked you to defer to the public policy of the Federal Arbitration Act, to defer to an arbitration when they weren't prepared to necessarily defer to arbitration. And now they, today, said well, we really didn't say you didn't say you didn't have jurisdiction. You just don't have exclusive jurisdiction. We think it may be concurrent jurisdiction. So they did move as well on that.

But I think, Your Honor, that the reason why you do have exclusive jurisdiction and the reason why the wind-down agreement is implicating is because there is no judicial review of what the arbitrator did. If there is no judicial review -- I think everybody agrees that the statute doesn't provide for it explicitly. If there isn't then what's left? Because the other thing that was critical as to the interplay between the Dealer Arbitration Act and the wind-down agreement, the other thing that's critical is that the Dealer Arbitration Act didn't abrogate totally the wind-down agreement. I think my colleague, my adversary, has agreed that it didn't totally abrogate it. There are specific provisions that survive. And so, that if you have an arbitration which has been completed because all the arbitrations had to be completed by July 14th,

and that's it then what's left on the areas where there was no reinstatement, the thumbs down for the Chevrolet dealership, you're back to being governed by the wind-down agreement. The wind-down agreement provided that you couldn't sue New General Motors. That still applies. There (sic) was abrogated solely to the extent that the Dealer Arbitration Act allowed for this binding arbitration remedy to be afforded to dealers who availed themselves of the opportunity to seek arbitration within forty days of the enactment of the Act. Otherwise, the wind-down agreement stayed in effect. And the wind-down agreement stayed in effect now for purposes for this entire period of time that the Rally dealership was not entitled to buy New General Motors vehicles because the wind-down provision for that still stayed in effect.

THE COURT: Mr. Steinberg, do you agree that if New GM hadn't complied with the arbitrator's award on the three brands for which the arbitrator ruled in Rally's favor that Rally could have come back here to enforce it with or without the no-sue clause?

MR. STEINBERG: Yes.

THE COURT: All right.

MR. STEINBERG: Yes. I agree with that because there, the provision, I believe, is ancillary to the arbitration decision. They're looking to implement and enforce the arbitration decision. And I think that if it wasn't being

done since the arbitration is over, they do need to have some kind of remedy. And they should be able to come back to this Court. But I do think it's this Court because I do think that part and parcel of the reason why there was exclusive jurisdiction language in the sale order, exclusive jurisdiction in the wind-down agreement that everybody who signed the wind-down agreement signed was that New General Motors had bargained for as part of the sale process -- had bargained for one forum, this Court who had approved the transaction, to handle anything relating to an enforcement or dispute relating to these agreements. And to take it more broadly, to handle anything that related to, in effect, the assignment and the continuation of the dealership network from Old GM to New GM. And I think that that was what New GM had bargained for here. And I think Rally understood that because they not only were passive on the entry of the sale order but in the wind-down agreement they specifically recognized the exclusive jurisdiction. And that didn't change. That didn't change. That's what New GM had bargained for.

The issue, Your Honor, with regard to judicial estoppel I think could be easily dealt with by the fact that in the case where New General Motors went to a court, it was to enforce a settlement agreement. The Dealer Arbitration Act specifically says that if you're going to settle then there is no arbitration and that the arbitrator has nothing to do. So

when parties settle, they take themselves out of the Dealer Arbitration Act totally based on the expressed language of the statute. Then if someone --

THE COURT: Why didn't New GM come to me to enforce that order?

MR. STEINBERG: We could have, for sure, Your Honor.

THE COURT: I'm sorry?

MR. STEINBERG: We could have, for sure, done that.

Your Honor, the issue with regard to Rule 48(c) of the Commercial Arbitration Rules, we did indicate that we weren't fully adopting the Commercial Arbitration Rules. The Commercial Arbitration Rule, Rule 48(c), is for purposes of seeking enforcement of an arbitration award and they are not seeking enforcement of an arbitration award. And the AAA rules itself say that the rules will be applied only to the extent that it's not inconsistent with the Dealer Arbitration Act. And we believe to try to, in effect, implicitly put in a judicial review concept through a rule that says that you can move for enforcement where we had protested it is inconsistent with the Dealer Arbitration Act which didn't provide for judicial review.

Now, the fact that -- I think my adversary pointed out to the fact that October 31 is fast approaching. And under the wind-down agreement, the Chevrolet dealership will be terminated. And the new dealership that New GM had promised to

-- an entity that used to be a Saturn dealership that operated in the area is going to be given. And there are rights that people have because of that unless something happens in this court or another court. But there is this ticking deadline that is there. And they never -- they filed a motion -- a complaint in August. They themselves have never moved for an injunction or for a stay or to try to continue the October 31 deadline. And I don't think that they can. I think that they had agreed that it would get terminated. I think even the Dealer Arbitration Act specifically wanted finality to these issues and to have finality because it's not only New GM's rights that are being implicated but we've had a dealer who's effectively been on hold since December of 2009 waiting to go in on November 1st. And their rights will be implicated as well.

I think that, Your Honor, that with regard to the interplay between the wind-down agreement and the Dealer Arbitration Act -- the two most critical things is that there is no judicial review that's specified in the statute. And because there's no judicial review, you're left with a wind-down agreement that had not been, in effect, modified at all except for the overlay of allowing for binding arbitration on a right given by Congress. And therefore, the commencement of the lawsuit after the award had been given by the arbitrator is a violation of the wind-down agreement and the provisions that

say that you should not sue and you should not interfere.

I will note, because it hasn't been said, that the arbitrator gave his award in June and New General Motors gave a letter of intent for the other four dealerships that the arbitrator said had to be reinstated. And Rally has been reinstated for those other four dealerships. And this --

THE COURT: Oh. So when I said it won three-quarters, actually it won four-fifths? Or with respect to four of the five franchises that it once owned?

MR. STEINBERG: That's correct. So they are operating right now. And they got their letter of intent which was supposed to be given by New General Motors, I think, with ten days of the arbitration award. It was only after that they were well down the road to getting the four in place that they decided to sue for the fifth. And, Your Honor, our brief tries to strip away the layers. And to some extent when you orally argue, you try to figure out how much of all the arguments you have to make. But this was even governed by the Federal Arbitration Act. I'm not even sure whether -- what they're arguing about would be subject to any kind of judicial review anyway. We do set forth in our brief the arguments that we think show that there was -- that the arbitration award was consistent with what should have been done because there was not one franchise agreement but there were five franchises agreement. And it's been dealt with because they've taken four

of the five and we still have one that's outstanding. And we point to the language of the sales agreement which talk about "General Motors separately on behalf of its division identified" and talk about the "separate" nature of each of these agreements. The wind-down agreements uses the plural, doesn't use the singular for purposes of talking about these agreements. And not to be overly cute about the argument, but if they were right that this was one agreement and not five agreements and the arbitrator found a taint with regard to one portion of an integrated agreement then the result would be the same as if it was an executory contract under the Bankruptcy Code with five lease schedules as part of one integrated agreement where the debtor couldn't perform all five. It's an all-up or nothing. And if that's the case, there would not have been a reinstatement for all five instead of one. That's the natural outflow of what their argument is which is that if you've got a taint on an integrated agreement which is nonsoluble then the whole agreement falls not that the whole agreement becomes good. And so, what you have here is someone who got the benefits of four dealerships. Then after they got the four dealerships on the reinstatement decided to sue and is now making an argument which is I want my cake, I want to eat it, too, in the context of a statute that doesn't provide for this type of relief.

Your Honor, if you'd just bear with me just one

second, I just want to check my notes to see if I --

THE COURT: Sure.

MR. STEINBERG: -- have answered your questions.

(Pause)

MR. STEINBERG: I think, Your Honor, when you said -- you asked my adversary the question did the Dealer Arbitration Act trump the wind-down agreement for all purposes and he answered no that it was incumbent on you to try to make the two consistent and coherent that he was essentially making the argument that I'm asking Your Honor to, as well, which is that the wind-down agreement had vitality and it was modified for purposes of the covenant not to sue solely for the purposes of doing the binding arbitration procedure consistent with the statute that Congress had subsequently passed. Thank you.

THE COURT: Okay. Thank you. Mr. Snyder, reply?

MR. SNYDER: Your Honor, to first argue what is a covered dealership, what is a not covered dealership to use executory contract analyses versus using franchise law analyses, using California law versus Title 11 law, that's another reason why the California court has jurisdiction because, again, what Mr. Steinberg is doing is saying well, look, Judge, you have jurisdiction. You can apply bankruptcy law between two nondebtor parties as to what means a covered dealership under the Federal Arbitration Act. And any of the 600 dealers who applied for arbitration under GM could do that

as well. And it seems to me that if Congress meant to give dealers and the AAA jurisdiction over these acts then by a natural extension, he meant them to be final and binding. Counsel for New GM sort of takes the car and then he hits a brake. He says the covenant not to sue was abrogated by the Dealer Arbitration Act but it stops there, that there is no right after the arbitration. And that is not true and also doesn't address the question of federal question jurisdiction that the federal court can possess jurisdiction over.

And he raised the Thomas case, Your Honor, but the statute involved in the Thomas case is the Federal Insecticide Fungicide and Rodenticide Act. In that statute, Your Honor, and I cite to Section 136a(c)(1)(F)(iii) of Title 7: "The FIFRA arbitration scheme allows judicial review of 'the findings and determinations of the arbitrator' only in the instance of fraud, misrepresentation or other misconduct by one of the parties to the arbitration or the arbitrator. This provision protects against arbitrators who abuse or exceed the powers or willfully misconstrue their mandate under the governing law." So Title 7 allowed for judicial review or allowed for a response to Your Honor's question as to what happens when an arbitrator acts inappropriately. Those last quotes, by the way, Your Honor, were the Thompson v. Union Carbide, 473 U.S. at 592.

Here there's nothing. There's no ability for Rally

or any of the 600 dealers to get redress as a direct result of the arbitrator's conduct no matter what it is. And so what they're saying is everybody, come back here. And we just don't believe that's appropriate under the case law. It's not appropriate under Union Carbide. It's not appropriate under Vaden. And it's not appropriate, we would suggest, under the Second Circuit law.

Your Honor, the statute is less than a year old. Of course, the cases we need to use are cases by analogy which are the FAA statutes. So under the FAA -- I'm sorry -- line of cases, there are agreements. Agreed. But that doesn't mean the arguments aren't consistent because the AAA rules assume that if you're a party to the arbitration you've agreed to consent to the outcome. In the Second Circuit case, in the Idea Nuova case, the statute is silent just like the statute -- I'm sorry -- the agreement is silent just like the statute here is silent. AAA rules apply and we're not saying anything else. And the Second Circuit said if the AAA rules apply then whatever the arbitrator says is final and binding and the unhappy party can then go to the district court and try to confirm that arbitration. Makes sense. That's all we're seeking to do here. The statute is silent. To suggest that we have no right of judicial review of an arbitration belies the fact that every stage plus Title 9 allow for confirmation, vacature, review of arbitrations.

Now, Mr. Steinberg is right. The statute 48(c) only speaks to judgment. And maybe the California district court'll say you can only seek to confirm the judgment. You can't seek to vacate it. You can't seek to modify it. And interprets Rule 48(c) that way as counsel did. But why can't Rally have the chance to allow California law to do that?

Your Honor, this is important. I'd like to go through the wind-down agreement and the jurisdiction sections because they are not inconsistent with the relief we're seeking here. This is from GM's own motion. "The Court retains exclusive jurisdiction to enforce and implement the terms of this order, the MSPA," which is the wind-down agreements, "and each of the agreements executed in connection therewith, including the deferred termination agreement in all respects including, but not limited to, retaining jurisdiction to resolve any disputes with respect to or concerning the deferred termination agreements."

There's no dispute regarding the deferred termination agreements at all. There's a dispute as to whether Chevy is a covered dealership under the Dealer Arbitration Act. We take no position as to whether this Court -- the sale order speaks for itself. Section 13 of the wind-down agreement. "Continuing jurisdiction. By executing this agreement, Dealer hereby consents and agrees that the bankruptcy court shall retain full complete and exclusive jurisdiction to interpret,

enforce and adjudicate disputes concerning the terms of this agreement and any matters related therein and survives termination."

Absolutely. There's an October 31st deadline. The wind-down agreement sets that out. We're bound to the extent we're bound under the wind-down agreement. We've asked GM to extend the October 31st date because of the late hour. They've refused. So now we have to deal with the October 31st deadline or get an extension by a court of competent jurisdiction.

But we're not addressing any of those provisions. Our -- we are seeking jurisdiction based on the Dealer Arbitration Act and not on the sale order and not on the wind-down agreements. This Court still has jurisdiction over those.

Your Honor, the argument about timing -- no good deed goes unpunished. They answered on September 7th and came into this court on September 10th. And then when we tried to get a hearing date as quickly as possible, we agreed we wouldn't go to the court in California to seek a stay if we could get a hearing date on October 4th. And we've abided by our agreement and we're anxiously awaiting whatever the Court's determination is going to be. But we deferred to this Court first because that's where New GM went. And nobody delayed here. As soon as the motion was filed, we sought a quick hearing and we got one thanks to chambers and Your Honor's courtesy. But -- I believe I'm finished.

THE COURT: All right. Very well. All right. We're going to take a recess. I don't know how long it's going to take me. But you needn't be here before 4:30. And I'll come out with a ruling as soon thereafter as I can. We're in recess.

(Recess from 4:04 p.m. until 5:30 p.m.)

THE COURT: Have seats, please. I apologize for keeping you all waiting. In these jointly administered cases under Chapter 11 of the Code, General Motors LLC, which I'll normally refer to as New GM, moves for an order enjoining Rally Dealership from interfering with New GM's ability to, as it was put, to reform its dealership platform pursuant to a previous order I entered, from vacating or modifying an arbitration decision and from pursuing that effort in California district court.

Rally was a GM dealership that was being closed pursuant to an agreement that was acquired by New GM from Old GM. The Dealer Arbitration Act, which was subsequently signed into law, provided an opportunity for dealers such as Rally to become reinstated as New GM dealers, if they were successful in a binding arbitration proceeding, with New GM.

Rally won its arbitration proceeding with respect to three of its brands but not its Chevrolet brand. Rally is attempting to have this arbitration award modified or vacated in a federal district court in California. New GM argues that

there is no right to modify the arbitration award and, additionally, that my Court is the only forum that can hear this issue. In addition, New GM argues that Rally has been interfering with New GM's establishment of an alternate Chevy dealership in violation of its agreement with New GM.

While I understand the difficulties faced by dealers such as Rally as a consequence of the events of last year, the motion must be granted. The following are my findings of fact and conclusions of law in connection with this determination.

As facts, I find that on July 5th, 2009, I entered the 363 sale order. That sale order authorized and approved a master purchase agreement dated as June 26, 2009, often referred by the parties as the MPA, between Old GM and an entity that later became New GM. Pursuant to the MPA and the 363 sale order, on July 10, 2009, New GM purchased substantially all of Old GM's assets free and clear of Old GM's liabilities except as expressly assumed by New GM under the MPA.

As part of the transactions that were approved under the 363 sale order, Old GM entered into and assigned to New GM certain deferred termination agreements, which we refer to as wind-down agreements, which had originally been entered into between Old GM and certain of its authorized dealers. These agreements had been offered to dealers as an alternative to outright rejection of their dealer sales and service

agreements, which we sometimes refer to as dealer agreements under the rights afforded to debtors to reject executory contracts under 365 of the Code. The wind-down agreements provided, among other things, that in exchange for certain payments and other consideration, the affected dealers' dealer agreements would terminate no later than October 31, 2010.

In December 2009, Congress enacted into law a new statute called the Dealer Arbitration Act which gave wind-down dealers such as Rally the opportunity to seek reinstatement to the GM dealer network through a binding arbitration process. Rally timely filed a request for arbitration and an arbitration was held in May before an arbitration -- arbitrator in California. On June 8, 2010, the arbitrator issued an award directing New GM to reinstate Rally's Buick, Cadillac and GMC dealer agreements but ruling that Rally's Chevrolet dealer agreement should not be reinstated. New GM is now currently attempting to establish another Chevrolet dealership in the Palmdale, California area where Rally is located. During this process, the owner of Rally has continued to lobby New GM to reinstate his Chevy dealership. After various proceedings, New GM determined to relocate the Chevy dealership to Lancaster, California which triggered an action by Palmdale against the city of Lancaster in the Superior Court of California. Palmdale claims that the terms of an agreement between Lancaster and the new Chevy dealership violated a state law

that prevent cities from engaging in bidding wars to lure auto dealers and other large sales techs generating businesses to relocate them from one city to another. The owner of Rally, one Mr. Mayle, provided an affidavit on behalf of Palmdale in that action. New GM argues that Rally, through its agent, Mr. Mayle, is providing assistance in litigation against New GM and is interfering with the establishment of a new dealership in violation of the wind-down agreement.

Rally argues that the arbitrator was bound by the Dealer Arbitration Act to either reject or accept the entire dealer contract and that the arbitrator exceeded his authority by not reinstating the Chevy brand as well. Thus, on August 13, 2010, Rally filed suit in California district court seeking to vacate or modify the arbitration award and to prevent termination of his Chevy dealer agreement though presumably wishing to maintain intact the other aspects of the arbitrator's award which maintained his dealerships for the other three brands, Cadillac, Buick and GMC.

Rally alleges, in substance, that the arbitrator's award in not giving him a complete victory was erroneous as a matter of law in its failure to accept its position that all of the separate brands had to be considered together in the species of double or nothing. He has not alleged that the arbitration award was the result of bribery, fraud, corruption, manifest disregard of settled law or any other ground that

would be a basis for vacating an arbitration award if the Federal Arbitration Act applied.

I'll now turn to my conclusions of law. Turning first to jurisdiction and within the jurisdiction umbrella, first, to subject matter jurisdiction. First, it's plain that the district courts and bankruptcy courts in this district have subject matter jurisdiction over this controversy. The applicable subject matter jurisdiction statute is 28 U.S.C., Section 1334, the section of the judicial code that follows the judicial code sections relating to federal question, diversity and admiralty jurisdiction. 1334 deals with subject matter jurisdiction with respect to bankruptcy cases and proceedings. That section provides, in relevant part, subsection (b), with exceptions not relevant here, "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11".

Rally addresses the issue of "related-to" jurisdiction under 1334 but that isn't the relevant subject matter jurisdiction issue. Rather it's the "arising in" prong of 1334 where New GM relies on an order I entered last year in this case under which this Court retained exclusive jurisdiction in paragraph 71(f) to "resolve any disputes with respect to or concerning the deferred termination agreements". The deferred termination agreements, which as I noted are also

referred to as the wind-down agreements, included provisions by which dealers and New GM contractually agreed that this Court retained full and exclusive jurisdiction to enforce them as well as to specifically preclude Rally and other wind-down dealers from filing suit against New GM and taking any action to interfere with New GM's establishment of additional dealerships. I'll note parenthetically that there was nothing in the Dealer Arbitration Act to modify the subject matter jurisdiction of the federal courts nor to modify any of my earlier orders other than to provide what amounted to a defense to enforcement of the deferred termination agreements if and to the extent that a dealer prevailed in the arbitration process for which Congress provided.

Rally did prevail in the arbitration process with respect to three of its franchises and, presumably, would like to avail itself and enforce that part of the arbitration award. But it wishes to upset the arbitration result as to which it didn't prevail and used the hoped-for alternative result, that is, a reinstatement of its Chevy franchise, as a defense to its duties under the deferred termination agreement which duties otherwise obligated it to give up its Chevy dealership, that being a classic "dispute with respect to or concerning the deferred termination agreements".

Now, Rally may have come to an agreement by the end of oral argument. But in any event, I so rule that this Court

does have subject matter jurisdiction over this controversy.

Similarly, I find that this is a core matter. Under 28 U.S.C., Section 157(a)(2)(N), core matters include, with exceptions not relevant here, orders approving the sale of property. The 363 sale order and my approval of the wind-down agreement documented the outcome of those core proceedings. And a proceeding such as the motion now before me which seeks relief predicated on a "retained jurisdiction" clause in my order resolving a core matter is a core matter as well. The decision in Eveleth Mines, 312 B.R. at pages 644 to 645, is directly on point. In that case, the Court noted the motion that barred directly and necessarily comes out of a core proceeding in this case, the debtors' motion for authority to conduct a sale of assets of the estate free and clear of liens. Court proceedings under 28 U.S.C., Section 157(b) fall under the "arising under" or "arising in" jurisdiction of 28 U.S.C. Section 1334(b). Then the enforcement of orders resulting from core proceedings are themselves considered core proceedings.

The Second Circuit has held similarly. It's held that bankruptcy courts are empowered to enforce the sale orders that they enter and to protect the rights which were established by the sale order. See Millenium Seacarriers, 419 F.3d at 97; and Petrie Retail, 304 F.3d at 229-230. Petrie Retail is particularly instructive because it also dealt with a dispute between two nondebtors addressing rights that were

created by the sale order. Though Petrie Retail was not unanimous, it's no less binding on the lower courts for that reason.

Now there can be no dispute what the sale order actually said. Nor can there be any dispute as to the wind-down agreement said. Section 13 of the wind-down agreement had that continuing jurisdiction clause providing that the dealer hereby consented to and agreed that the bankruptcy court would retain full complete and exclusive jurisdiction to interpret, enforce and adjudicate disputes concerning the terms of this agreement and any other matter related thereto.

Here and to the extent Rally was successful in the arbitration, of course that would be a defense to win any effort to make it terminate its agreement. And to the extent that it wishes to either enforce the agreement as it has the right to do with the three franchises for which it prevailed or to defeat the agreement with respect to the one agreement where it lost, in any event they concern the terms of the agreement and, in particular, any other matter related thereto. I don't think that's subject to serious dispute.

Finally, I've considered and ultimately rejected Rally's suggestion that I exercise discretionary abstention on that. Plainly, there is a right to invoke discretionary invention under 1334(c)(1) of the judicial code. That's 28 U.S.C. Section 1334(c)(1) which provides that nothing in this

section prevents a district court in the interest of justice or in the interest of comity with state courts or respect for state law from abstaining or hearing a particular proceeding arising under Title 11 or arising in or related to a case until Title 11. And while it speaks principally of state courts and state law, I accept for the purposes of this analysis that we, bankruptcy courts have the power to abstain in favor of other federal courts when the circumstances so warrant. But I don't believe that the factors here so warrant. Standards that have been articulated for the exercise of discretionary abstention include of the efficient administration of the bankruptcy estate, comity, the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, the existence of the right a trial and prejudice to the involuntarily removed party. Some of these, obviously, come in removal cases.

Here, I think the factor that is most important is the effect of the effect deficient administration of the bankruptcy estate. This was a procedure that needed to be resolved quickly as evidenced by the very tight time frames that Congress imposed. As important or more so, the bidders of the world that come in to bid for assets in the bankruptcy court must have knowledge that bankruptcy courts will stand by the documents as they were then drafted to give the parties to those agreements the predictability in their relations for which they are binding and upon which they justifiably rely.

The Court in Eveleth Mines explained "as applied to a sale free and clear of liens, there are also good policy reasons for making a derivative core proceeding classification. Active bidding on assets from bankruptcy estates will be promoted if prospective purchasers have the assurance that they may go back to the originally forum that authorized the sale for a construction or clarification of the terms of the sale that it approved. Relegating post-sale disputes to a different forum injects an uncertainty into the sale process which would dampen interest and hinder the maximization of value. A purchaser that relies on the terms of a bankruptcy court's order and whose title and rights are given life by that order should have a forum in the issuing court." That is very strong guidance that suggests that a Court, like me, should not abstain in favor of another jurisdiction.

Similarly, comity is a factor that I would take into account if there were, as contrasted to here, strong state law concerns. But here, of course, there are not. I, no less than a district court, either in New York or California, can determine that which is just in determining whether or not to enforce or, as more relevant here, to undercut an arbitration award.

The degree of relatedness or remotedness of the proceeding to the main bankruptcy court is subject to a double entendre. On the one hand, this is not going to affect the

assets and order of its liquidation in court. But the factors articulated in Eveleth Mines likewise cause Courts here to be slow to abstain because giving purchasers of assets the comfort that their needs and concerns are going to be addressed is pretty important.

I consider the existence of the right to a jury trial inapplicable because I assume that this would be decided without a jury trial in either events and I also consider prejudice to the involuntary removed party under the facts of this case.

So for all of these reasons, I decline to exercise discretionary abstention.

Now turning to what I should do with this controversy before me. Both sides now seem to agree that the Federal Arbitration Act doesn't apply because it implements contractual agreements to arbitrate. And here, the right to compel arbitration comes not from a contract but from the Dealer Arbitration Act itself. And it also now appears to be undisputed that the Dealer Arbitration Act doesn't provide for judicial review of arbitration awards issued after the mechanisms for which the Dealer Arbitration Act provides.

Nor do I think that I can or should find an applied right to judicial review under that statute. First, as you know from reading many earlier decisions that I've issued, I start with textural analysis where I note the significant

absence of such a provision when federal statutes routinely provide for rights to federal -- to judicial review when that is the congressional intent. If I were to imply such a provision here that would be a species of judicial legislation. Second, assuming without deciding that I could appropriately look at legislative history on a matter where the statute is not in any way ambiguous, judicially in grafting rights under that statute would be particularly inappropriate when they'd be inconsistent with the congressional desire to establish this mechanism to avoid the excessive costs and delays of litigation and to impose tight deadlines to get the arbitration process completed.

Nor can I accept Rally's argument that New GM conceded a right to judicial review by reason of its willingness to proceed under the AAA's commercial arbitration rules. In responding to Rally's arbitration demand, New GM expressly stated that it did not waive any objections it might have to the arbitration or to any of the AAA's commercial arbitration rules including, in particular, where such rules would be inconsistent with the provisions or purposes of the Dealer Arbitration Act. For that same reason, I can't find a waiver on the part of New GM of its rights based on a failure to protest again after its initial reservation of rights was put on the record.

Then even if New GM had agreed to AAA arbitration

rules, the arbitration rules called for a mechanism to enforce an award not to attack it. Those rules provided that parties to an arbitration under these rules shall be deemed to have consented the judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof. See Rule 48(c) of the AAA Commercial Rules quoted at paragraph 29 of the Rally brief.

But that language conveys a right to enforce the arbitration award not to attack it. For example, if New GM had failed notwithstanding the arbitration award that Rally doesn't complain about to let Rally keep the three franchises the arbitrator said Rally could keep, Rally could have, at least arguably if not plainly in my view, come back to me and say make New GM do what the arbitrator said it should do. But this is the exact opposite of what we have here and one that's not authorized by the federal statute.

As I indicated in oral argument, and I think both sides agreed, the reasonable course for a judge in my position would be to construe the Court's earlier order and the subsequently enacted federal legislation to achieve as much harmony as possible and to honor the congressional intent to the extent that the federal legislation trumped my earlier order. But it would also be appropriate in my view to honor the congressional intent only to the extent that the federal legislation trumped my earlier order. Congress did say, of

course, with respect to providing for a defense to enforcement of the wind-down agreements with respect to any areas where the arbitrator ruled in the dealer's favor. And I think that if New GM had failed to honor the arbitrator's award, as I indicated a moment ago, I'd almost certainly enforce it. But that is the way by which we'd maintain harmony between my earlier order and the new Dealer Arbitration Act providing for the rights of dealers to invoke the arbitration mechanism in the fashion for which Congress provided. It doesn't provide for a blank check from me to rewrite the Dealer Arbitration Act.

Nor do I think that Rally can get around what is, in essence, an effort to achieve a quasi-appellate review of the arbitration award by saying that it's asking the California district court to make a federal question type determination under the Dealer Arbitration Act. That might be the case if Congress hadn't established the arbitration mechanism and if it had conferred on the district court's jurisdiction to decide issues as to what is or is not a dealership franchise. But the whole point of the statutory scheme was that New GM and dealers would proceed by arbitration. And while, if New GM had refused to arbitrate in the first place, I think that at least I would have had jurisdiction to order New GM to do so. But now that each of New GM and Rally have engaged in the arbitration process, presumably without any Court forcing either to do so,

we can't make the underlying arbitration award evaporate. We can only consider the circumstances, if any, under which the arbitration award is subject to judicial review. And I've already noted, of course, that the statute doesn't provide for such review.

Now, in that connection, I do not believe that under the allegations we have here, this construction raises constitutional issues. I assume without deciding that procedural due process requires a quasi-judicial determination, like an arbitration, to be conducted by a decider who isn't taking bribes or conspiring with one or another of the parties or, though it's more debatable, who ignored facts or binding authority on point. If there were such a contention, I'd at least have to consider whether I'd address it. And I think it's better to construe the Dealer Arbitration Act in such a fashion as to avoid any constitutional issues that would otherwise be relevant.

But I have no allegations of bribes, conspiracy, fraud or even manifest disregard of existing law in the matter before me. Though, if there were such allegations, I think I'd have to seriously consider whether there might be some implied right to remedy such a wrong or that in exercising my exclusive to jurisdiction to enforce or, impliedly, deny enforcement of the deferred termination agreements, I should take such facts into account. But once more, I emphasize that I have no such

allegations here.

In the absence of issues of that character, I think that Thomas and, particularly, Switchmen, the two decisions by the Supreme Court, apply to establish a rule that where an arbitrator was given the power to resolve controversies under a statute, that is, the Dealer Arbitration Act, where dealers and New GM were given rights under that statute, reviewed by the federal district courts or, of course, bankruptcy courts that are arms of the district court and have the power to issue final orders on core matters, of the arbitrator's determination is not necessary to protect those rights. I think I should restate it because I put too many parentheticals in there. Where dealers and New GM were given rights under the statute reviewed by the federal district courts of the arbitrator's determination is not necessary to protect those rights. And, of course, that's a paraphrase of Thomas, 473 U.S. at 588 quoting Switchmen where I'm analytically substituting the Dealer Arbitration Act for the Railroad Labor Act and where I'm substituting arbitrator's determination for board's determination.

So I don't believe that judicial review is necessary except in those cases not presented here, and here only arguably, where there are allegations of fraud, corruption or manifest disregard of an existing decision. And for reasons I described above, I think the exclusive jurisdiction provisions

of the sale order must stick.

First, of course, they're res judicata so they remain binding in the absence of an appellate ruling changing them for a legislative pronouncement that does so. Second, I assume without deciding that Congress could, if it wished, to have taken my exclusive jurisdiction away just as Congress can take away jurisdiction from the lower federal courts on other matters. But Congress didn't do that. If we temporarily put aside issues as to the right to judicial review and decisions as to the merits, I assume, without deciding, that a California district court could under its diversity jurisdiction have subject matter jurisdiction over a controversy like this one. But if it did, it would be foreclosed from exercising its subject matter jurisdiction by reason of the final exclusive jurisdiction order that I entered back in July of 2009. This is no different analytically than the effect that an exclusive jurisdiction order would have over a state court proceeding. Most state courts don't need an expressed grant of subject matter jurisdiction to hear controversies before them. They normally have subject matter jurisdiction over whatever comes through their doors. But that doesn't mean that they can hear controversies when a court order or other federal law, like some federal antitrust laws or securities laws, give a federal court exclusive jurisdiction. Some federal statutes and the order that I entered into are limits on jurisdiction that might

otherwise exist.

Then Rally makes a judicial estoppel argument noting that in a proceeding against another dealer, New GM brought an action in federal court in California invoking diversity and federal question jurisdiction, the latter under the Dealer Arbitration Act, seeking to require that dealer to comply with a settlement agreement and to drop its efforts to proceed under the Dealer Arbitration Act. Frankly, I'm not impressed with the wisdom of that approach and, for the life of me, can't understand why New GM sought relief that way instead of coming to me. But I don't think its effort in that regard rises to a level of a judicial estoppel.

Rally depends on three statements to establish its claim of judicial estoppel. They are that the district court would have jurisdiction under 28 U.S.C. 1332; that the district court would have federal question jurisdiction under 28 U.S.C. 1331 because the controversy there allegedly arose under the Dealer Arbitration Act; and that arbitrators would only be empowered to decide whether or not the specific dealership should be added back to the GM dealer network and that "all other issues that arise under the Act must be addressed by a Court of competent jurisdiction".

I don't think that any of these are particularly to the point. I've noted before that I assume that diversity jurisdiction provides subject matter jurisdiction to the

California court here. But I've also ruled that that can't trump the bankruptcy court's exclusive jurisdiction provision. And while I disagree that there and here would be federal question jurisdiction under the Dealer Arbitration Act for the particular claim there and here asserted, even if there were such federal question jurisdiction, once more, it wouldn't trump the bankruptcy court's exclusive jurisdiction provision. And I don't think there's anything particularly inconsistent between New GM's third point in that Santa Monica action and the points it's making here given the difference between the facts in each of those cases and the context in which New GM made its observations. There, an attempt to enforce a settlement agreement under which the namees (ph.) agreed to dismiss their arbitration and New GM was saying that arbitration wasn't appropriate at all rather than dealing with the consequences of a completed arbitration in which there was an arbitration award.

But even if there were, I'd see other problems in invoking judicial estoppel as well. As Rally notes, at page 23 in its brief, citing the Second Circuit's decision in Uneeda Doll Company, "judicial estoppel prevents a party from asserting a factual position in one legal proceeding that's contrary to a position that it successfully advanced in another proceeding". Here, aside from the lack of inconsistencies, the positions that have been taken are legal not factual. And

there, New GM didn't ask the Santa Monica Motors court to interpret or enforce the wind-down agreement or, indeed, to interpret or enforce the Dealer Arbitration Act at all. The latter point is why I think that New GM was just wrong when it then tried to invoke the latter as a basis for 1331 jurisdiction. I'm not sure what it was thinking. But under the standards of New Hampshire v. Maine, I find that the positions are not clearly inconsistent and I cannot find any perception that either the first or the second Court was misled or that New GM would derive an unfair advantage here if not estopped.

Finally, I think that even if judicial review were available of the arbitrator's award, I couldn't vacate the arbitrator's award here. First, even if the arbitrator was wrong, I don't see the arbitrator having been so wrong that the error would warrant bucking fundamental principles limiting the scope of review of arbitration awards. There was no case supporting Rally on this issue. Rally is, in substance, asking the Court or the Courts to, in essence, make new law on this point.

And assuming, though for reasons I just noted, I think this assumption is unwarranted, that I could provide ab initio review of the arbitrator's decision, I think the arbitrator got it right at least on the arbitrator's assumption that he could rule one way with respect to the Buick, GMC and

Cadillac franchises and differently with respect to the Chevy franchise. I think the dealer's sales and service agreements have to be read separately. Each stated that it was executed by GM "separately" on behalf of its division identified in the specific addendum. And each dealer agreement provided that the agreement for each line make is independent and separately enforceable by each party and the use of the common form is intended solely to simplify execution of the agreements. So I think that in light of that, Rally had five franchise agreements under which the arbitrator's ruling focusing on each brand separately would be more than merely reasonable. If otherwise warranted by the underlying facts, it would be right.

For the foregoing reasons, New GM is to settle an order in accordance with the foregoing as quickly as reasonably possible, that order to be settled on no less than two business days' notice by hand, fax or e-mail. I assume that New GM will use one of those methods so I don't have to provide for an alternative mechanism if it were to use snail mail. The time to appeal from this determination will run from the time of that order's entry and not from the time of this dictated decision.

All right. Not by way of reargument, are there any matters that I failed to address or any questions?

MR. SNYDER: No, Your Honor.

THE COURT: Hearing none, we're adjourned. Good

evening, folks.

MR. SNYDER: Your Honor, if I may just quickly?

THE COURT: Yes, Mr. Snyder?

MR. SNYDER: Your Honor, under Bankruptcy Rule 8005, to the extent we seek a stay pending appeal and that would be a necessary predicate for an award, for the reasons set forth in our papers and in the oral argument, I request -- am making this oral application for a stay of Your Honor's order pending appeal.

THE COURT: I'll accept the oral application for a stay but we'll do it after a ten minute recess. And each of you can make your points at that point in time.

MR. SNYDER: Thank you, Your Honor.

(Recess from 6:19 p.m. until 6:37 p.m.)

THE COURT: Have seats, please. Okay. Mr. Snyder, your application for a stay.

MR. SNYDER: Thank you, Your Honor. Your Honor, in your decision, I believe the Court stated -- and I apologize if I'm putting words in the Court's mouth -- that areas such as manifest disregard for the law and fraud were not areas that were alleged here. And that might be properly the province if not exclusively the province of the district court in California. And I would ask the Court to turn to, Your Honor, Exhibit I which is Rally's petition to modify. And in Exhibit I, Your Honor, starting on page 10, whether appropriately or

not, Rally uses the Federal Arbitration Act as a guide as to what the district court can look to when determining whether it has jurisdiction. And it starts at the bottom of page 10, and I'm quoting, "that the arbitrator in this matter was guilty of misconduct, misbehavior and exceeded his power, i.e., manifest disregard by ruling on a matter not submitted for determination and, (2)attempting to fashion a remedy not authorized by Section 747 of the Act." And the argument goes on and a little farther down, it addresses corruption, fraud and undue means by GM which, again, although it mirrors a section of the FAA, is also grounds that Rally sought in the California district court in order to vacate and modify the arbitration. So I wanted the record clear that the manifest disregard of the law, fraud and the usual grounds that a party would seek whether under a state statute or the federal arbitration statute to undo the arbitration were pled by Rally in the California action. And so, I believe that those types of matters, and I believe Your Honor pointed this out, matters of manifest disregard, fact and law as well as fraud, corruption, mistake and exceeding powers are matters that the California district court should hear -- can hear, excuse me, and should hear.

Your Honor, has basically said that you have sole and exclusive jurisdiction even though the district court may have jurisdiction over these matters. And as respectfully submitted that the Court may have concurrent jurisdiction but over

matters such as manifest disregard of the law that the federal district court in California also has jurisdiction over this matter. And it's properly before it now.

With respect to the federal question, again, Your Honor seemed to indicate in his decision that the sole and exclusive jurisdiction was given to the bankruptcy court as a result of the wind-down orders. The Court did not address as we go through in detail, starting at page 28 of our objection, the decision of the Supreme Court in Vaden v. Discover Bank. And I alluded to it, Your Honor, in the original argument. But the Supreme Court, overturning, I believe, four circuit courts in Vaden, specifically held that they can look through the petition to look at the parties' underlying substantive controversy. And, Your Honor -- and this is where the Court and Rally might differ. The substantive controversy, the predicate of the petition arises under the Dealer Arbitration Act. It does not arise under the wind-down agreement because it was created not from the wind-down agreement but the Dealer Arbitration Act. So I think there's compelling reasons as a result of the recent Supreme Court case in Vaden to allow the federal district court to hear a federal controversy arising out of a federal statute. And I've been practicing here for a long time, Your Honor. To the extent that it's an issue involving a purchaser wanting to get its -- the value of what it bargained for, we are not saying this Court does not have

jurisdiction. The Court has already held that it has arising-to jurisdiction and it may well have that jurisdiction.

But I think I've pointed to at least two, the federal question issue as well as the due process constitutionality issue as to why the California district court has strong -- strong subject matter -- rights to exercise its subject matter jurisdiction. This is not a cursory -- a statute that only cursorily affects the federal court, but it directly affects the federal court. And I believe, Your Honor, for those reasons, the Court not entertaining or analyzing that and then not seeing that the petition itself does seek -- does allege manifest errors of law as well as fraud and improper powers by the arbitrator that we would be successful on the merits. And we would be able to, Your Honor, obtain a stay of Your Honor's order to the extent it would give us additional time to seek a stay or to seek a determination in either the district court here or in California.

THE COURT: Well, I understand your desire to go to the district court here. I have more trouble trying to go to the district court in California. In fact, that walks, talks and quacks a lot about the actions that Judge Weinfeld found so objectionable in Teachers Insurance v. Butler before the Second Circuit said what it said in Teachers Insurance v. Butler where there was never to collaterally attack his judgment by going to another court. I mean, I don't claim to be infallible, Mr.

Snyder, but it seems to me that if somebody's going to say that I'm wrong, it's got to be either the district court or the Second Circuit.

MR. SNYDER: Your Honor, we were in front of the California district court before GM was here. We can always go back to the filing of the bankruptcy case. But this is clearly different than Teachers. Here, we have already commenced an action in the California district court. We're not forum shopping and running to California because we don't like what the Court is saying. We deferred in this case because they made the motion that we were going to defer to the bankruptcy court before we took any action in California. But we're not looking around for a second bite of the apple. We're already in California. Issues already been joined. They've already answered. So we're at summary judgment stage anyway in California and we have a ticking clock of October 31st. That's very different than going to another Court when you don't like what this Court has to say, Your Honor. I mean, I don't know if we need to address that here. But that's not what we're looking to do. It's for powers other than I to decide whether we seek a stay here or we go back to the Court where there's been a complaint and answer filed and seek a stay there. I'm being straightforward with the Court. It's not our intent and I know the Court might have discomfort with that, but the action was already commenced there. And that's what led to GM

coming here.

THE COURT: Well, forgive me, Mr. Snyder. The reason that you can truthfully say it's discomfort is because I try very hard to consume my anger and to maintain my demeanor. I fully understand the rights of any litigant before me to take me up the street. But going to another Court right after you've litigated before me for the last three hours and I've given you a ruling which may or may not be right but which was after a lot of thought and effort is one that is more than a source of discomfort.

Why don't you continue with the remainder of the three bullets on the applicable case law on an entitlement to a stay and address, if you will, what you're prepared to offer in the way of a bond if I grant a stay?

MR. SNYDER: Your Honor, the argument with respect to the constitutionality -- I had made the argument with respect to whether a federal question exists vis-à-vis the interpretation of the federal statute and going behind the arbitration. I made as well -- I would point out, Your Honor, actually there are four grounds. The third one is diversity. And I think although GM was silent on it, the Court, I believe, in its decision, admitted that diversity exists but, again, stated that the sale order would trump the district court even though diversity might existed there. And the fourth argument, Your Honor, is 48(c) and Your Honor is correct. It does just

refer to judgment. It does not refer to the right to vacate or amend or to modify. It's respectfully submitted, though, Your Honor, that the district court can make that decision as well. Your Honor may be right in all they can do is say thumbs up or thumbs down with respect to a judgment. But at least with respect, I believe, to the fifty state laws, with respect to arbitration and the FAA, it's not so limited, that applicants are usually allowed by statute, certainly under the FAA, to not only seek a judgment but to modify or vacate. But that's something the California district court may hold as well, Your Honor.

And because there are five sep -- four separate grounds, the constitutionality, the federal question, the diversity and Rule 48(c), in Rally's mind, is more than a compelling reason to hold that concurrent jurisdiction exists and not simply exclusive jurisdiction exists. That Your Honor's sale order says what it says but that the Arbitration Act raises issues that need to be addressed. And it's submitted by saying diversity exists but the sale order trumps it, Your Honor, I would suggest that the district court in California does have jurisdiction and does also have the authority to hear these issues. And for those reasons, I think the Court or Rally would be successful in arguing that it would be successful on the merits on those four particular grounds.

I would state also, Your Honor, that the judicial

estoppel argument is just fascinating to me. I -- you asked a question of GM and it was your last question, I believe, which was are you saying you could have gone to New York or California but you decided to go to California. And they said yes. And so, what they're basically saying is we can go to California or New York but you can't. And that argument is, in essence, saying we've waived subject matter jurisdiction by entering into the wind-down agreements. And I don't believe that's correct. And I believe if GM can go into New York and California then Rally can go into New York and California. And to simply say that we're -- our fortunes rise and fall here, well, neither -- GM's fortunes didn't rise and fall here either. They chose not to come here. And so I think we should have that same right.

And for those reasons, Your Honor, we'd like a stay of Your Honor's order until there is an appropriate order of the district court.

THE COURT: All right. Mr. Steinberg?

MR. STEINBERG: Your Honor, in the context of the order that you've indicated that you will enter, a stay pending appeal makes no sense. And the whole oral argument that you heard here before was really a reargument motion and was not a stay pending appeal motion.

Your Honor has indicated that it was inappropriate for them to go to California and to continue to prosecute the

action in California. So if you're going to stay the entry of the order, what does that mean as a practical matter? After having ruled that it was improper to go to California, he now is actually asking you to stay that order so he can go to California? Which is 180 degrees of the relief you just granted? This is not like he has a judgment and he wants to stop us from enforcing the judgment because he wants to take his appellate rights. I'm trying to collect on a monetary judgment. This is started because he shouldn't have gone to California in the first place. He shouldn't have violated the wind-down agreement. He should have done -- he didn't have a judicial right. And now he's asking Your Honor to stay it so he can, in effect, do what he started to do which was the reason why we brought the motion in the first place.

But I think he didn't answer your question what are the four prongs for a stay pending appeal. He did talk about the likelihood of success on the merits. And I don't think he said anything today other than try to reargue what Your Honor had just ruled upon as to the likelihood of success on the merits.

Frankly, the other three grounds all, I think, favor New General Motors. The harm to the appellant -- well, on the surface, one could say he's harmed because the Chevrolet dealership will be terminated on October 31st. The actual harm is that he didn't have a judicial right and you're not

depriving him of a judicial right. Conversely, the harm to others being the appellee, which is New General Motors and the new dealership, are dramatic if Your Honor's order is not enforced. And Your Honor's opinion addressed the public interest element which is the necessity of protecting buyers in a Section 363 order and the Court's exclusive jurisdiction and the public interest that's involved there.

I think the only other thing I would add, and it has nothing to do with the stay pending appeal other than the likelihood of success, I'll just point out that he wants to refer to the complaint that was -- the petition that was filed by Rally in California. On the corruption, fraud and undue means by General Motors, that's just a label that he put on a caption in a petition. He does not allege one thing about fraud corruption in connection with the arbitration process. He's saying that there were public statements made by Fritz Henderson as to, in general, the importance of a dealership network, and he's saying that that was misleading. But it has nothing to do with actually what happened in the arbitration and under the Dealer Arbitration Act. And as far as the misconduct being beyond prec -- established precedent, if you read the paragraph, what he's saying is that the award goes beyond Section 747 because they believe that that statute, which is absolutely silent on the issue, doesn't allow for the assumption of one dealership -- the rejection of one dealership

agreement and the assumption or the reinstatement for the other three. That's the misconduct of going beyond what is established precedent.

Your Honor's decision ruled that if you had to address the merits, even though you weren't, you thought that New GM and the arbitrator was right on that issue. So he can point to a petition, which is based on the Federal Arbitration Act, citing standards but have no application to the facts of this case and then everything else on the standards for a stay pending appeal warrant for the denial of the stay.

And he purposely didn't answer your question as to a bond because, at this point in time, the bond -- we're not looking for a bond. We're looking for the relief that we brought our motion for. And a stay pending appeal is, in effect, a denial of our motion which Your Honor just granted.

(Pause)

THE COURT: Stand by, everybody. Sit in place.

(Pause)

THE COURT: Gentlemen, in this supplemental proceeding, Rally moves by oral motion, with my consent, for a stay pending appeal. And I am granting its motion to the extent of providing for a seven calendar day stay to permit Rally to go to the district court in this district. And the motion is otherwise denied. The following are the bases for my exercise of discretion in this regard.

Though I have no memory of hearing it expressly invoked, a motion of this character is governed by Federal Rule of Bankruptcy Procedure 8005. It provides in relevant part that "A motion for a stay of the judgment order or decree of a bankruptcy judge for relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance...A motion for such relief" granted by -- "or for modification or termination of relief granted by a bankruptcy judge may be made to the district court but the motion shall show why the relief, modification or termination was not obtained from the bankruptcy judge. The district court...may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court."

As the language I just quoted makes clear, the rule is not terribly helpful with respect to the standards for considering a motion of that character. Rather, for that, we look to the case law which, in the bankruptcy appellate arena, takes a considerable amount of guidance from similar issues presented under the FRAP, the Federal Rules of Appellate Procedure.

I exercise my discretion in accordance with my earlier decision, coincidentally in General Motors, at 409 B.R. 24, and the affirmants by Judge Kaplan of the district court in 2009 U.S. District Court Lexis 61279. As I stated in my ruling there, in GM, the decision as to whether or not to grant the

stay of an order pending appeal lies with the sound discretion of the Court. See, for example, In re Overmyer, 53 B.R. at 955. Though the factors that must have to be satisfied have been stated in slightly different ways and sometimes in a different order, it's established that to get a stay pending appeal under Rule 8005, a litigant must demonstrate it would suffer irreparable injury if a stay were denied; there is a substantial possibility, although less than a likelihood of success on the merits of a movant's appeal; other parties would suffer no substantial injury if the stay were granted; and that the public interest favors a stay. See, for example, Hirschfeld v. Board of Elections, 984 F.2d at page 39. It's a decision of the Second Circuit in 1992; In re DJK Residential, 2008 U.S. Dist. LEXIS 19801; and 2008 WL 650389, a decision by Judge Lynch back when he was a district judge; and In re Westpoint Stevens, 2007 U.S. Dist. LEXIS 33725, 2007 WL 1346616, a decision by Judge Swain of the district court.

The burden on the movant is a "heavy one". See, for example, DJK at *2. See also U.S. v. Private Sanitation Industrial Assoc., 44 F.3d 1082 at page 1084, another decision of the Second Circuit. To be successful, the party must "show satisfactory evidence of all four criteria". In re Turner, 207 B.R. at page 375, a decision of the former Second Circuit BAP in 1997. Moreover, if the movant seeks the imposition of a stay without a bond, the applicant has the burden of

demonstrating why the Court should deviate from the ordinary full security requirement. See DJK at *2, Westpoint Stevens at *4.

While, as Judge Lynch noted in DJK, the Second Circuit BAP has held that the failure to satisfy any prong of the four-circuit test "will doom the motion," with Jerry Lynch having cited Turner. The Circuit in more recent cases have engaged in a balancing process with respect to the four factors as opposed to adopting a rigid rule. In my earlier ruling in GM, I assumed without deciding that the balancing approach would be more appropriate. And I'm going to do likewise here. I also note that when Judge Kaplan affirmed me in GM in the decision that I described a few minutes ago, I think he took a similar approach.

Let me start with injury first. Obviously, I take the loss of a franchise seriously. And indeed, early in the decision that I dictated -- I guess it's now an hour or an hour and a half ago -- I did hopefully express my empathy to dealers losing their franchises. However, what caused the lack of the franchise, or the loss of the franchise, is not the ruling that I issued tonight. It was the dealer termination agreement that was entered into over a year ago. What we have here is Congress recognizing the injury to dealers as a consequence of either rejection of dealership agreements, as was the case in Chrysler, or even the soft landing termination agreements that

we had here, provided dealers with an arbitration remedy to, in essence, undo that which otherwise would happen. And Rally took advantage of that and it won in three-quarters -- or four-fifths -- Pontiac, I guess, ultimately not being relevant -- of the matters which it took before the arbitrator. Now, in essence, what it's asking for is to avoid the injury from a year ago and at the same time to avail itself of the benefits of the arbitration to the extent that it won. With it having won with respect to Buick, Cadillac and GMC, I don't think there is irreparable injury to it by reason of its not having shot the moon in its litigation efforts before the arbitrator.

Frankly, folks, I tried very hard to get it right. And we're going to get to a likelihood of success in a minute. But I do not believe that my ruling today causes irreparable injury. And I think really all we're talking about is the results of an arbitration system that was made available for Rally and for which it only succeeded in part.

I will, however, assume that there is a -- at least a peppercorn of irreparable injury. I'm certainly not going to disqualify Rally for not showing more in the way of irreparable injury. And I'm not, as I indicated, going to require it to make a strong showing on all fours. I am going to take a balancing approach so I'm going to turn to that next.

So let's talk then about likelihood of success which is where Rally spent the bulk of its argument. Although we

talk about likelihood of success, that's a shorthand for a more nuanced analysis. The technical standard is there is a substantial possibility although less than a likelihood of success on the merits. Well, let's slice and dice the various aspects of my earlier ruling.

First, the propriety of my conclusion that I do have subject matter jurisdiction and that I have core jurisdiction -- core, of course, not being the subject matter jurisdiction issue but talking about the power of a bankruptcy judge in contrast to a district judge to decide. Those two rulings now seem to be accepted or at least unchallenged. And although there was no express discussion of my decision not to abstain, I didn't hear any argument on that. And, frankly, discretionary abstention is called discretionary for a reason. There would have to be an abusive discretion in my electing not to abstain. And I think that there would not be a material likelihood of success on that and would be far short of a substantial possibility.

On the merits, it's undisputed that we're not talking about the Federal Arbitration Act, that the Dealer Arbitration Act provides no right to appeal. And my ruling did not go so far as to say that under no circumstances under anything that might ever be alleged would I deny the right to appeal. What I have said is that to the extent, if any, to which there would be such a right, a construction to, in essence, save the

constitutionality of the statute if it were otherwise put in question, there would have to be something seriously wrong with the arbitration in the way of fraud, corruption, bribery being a species of corruption, or, and I articulated it differently, disregard of applicable authority. I went on to provide two additional levels -- you can call it dictum; you can call it alternative grounds, whatever, which caused me to believe that it's not likely that there's going to be a reversal.

And as far as whether there's a substantial possibility, on the facts that were put before me, I don't think there's even that. To be sure, words were put before the district judge triggering responses that if this were an action under the Federal Arbitration Act would get a judge's attention. But as the recent decisions by the Supreme Court in Bell Atlantic v. Twombly and, especially, Ashcroft v. Iqbal tell us, just invoking words making conclusory allegations in a pleading isn't enough. You can't talk about corruption without giving the Court some facts as to lead the Court to believe there was corruption. And we're not talking about corruption by GM. We're talking about corruption by the arbitrator. I used the example before of taking bribes. There are no allegations of ex parte communication. There are no allegations of any irregularities in the proceedings before the arbitrator other than the assertion that, as a matter of law, the arbitrator got it wrong. And even then, there's no

allegation that the arbitrator disregarded any particular case that would suggest to the arbitrator that he got it wrong. So while I think there would be a substantial possibility of success on appeal if I were somehow to rule that there is no right to appeal and that I got to close my eyes to irregularities of the type that I just described if they were shown, it doesn't affect the outcome here because I don't have any facts suggesting any of those things. Bottom line, folks, I do not find a substantial possibility.

Third factor. Other parties would suffer no substantial injury if the stay were granted. And here, I think there are potential injuries, at least if we go past October 31st, of one type, for sure, and another which more properly may be regarded as being a public interest concern rather than a private prejudice. For GM's benefit, I'll say that I see no prejudice in staying for five days to allow the district court to second guess me on the stay application. And for that reason, I am going to grant a stay to the extent of five days.

But we have a new dealer who's taking over on the 31st of October. I don't have evidence on it, but I got to assume that the existing franchisee's gain is going to be the new one's loss. They're either going to be competing with each other or that other guy is going to be made to wait if this thing can't proceed past October -- if this somehow proceeds past October 31st. And we have a nationwide program which was

judicially blessed back in July of last year for these dealer unwinds and I think it's prejudicial to New GM to put this system in play to any greater extent than Congress did by its statutory enactment. And Congress didn't say everything you're doing is undone. What it did was say well, we're going to set up this arbitration mechanism. And that's exactly what we got. And it goes without saying that I comply with the congressional but I don't think we should be going beyond what Congress said.

Lastly, the public interest favors a stay. That's the final factor. While I quoted the language before, and I think Rally acknowledged its importance, that we deliver to the purchasers of assets in bankruptcy sales that which we have promised. And if and to the extent that the counterparty to a deal with an estate comes back and says I need you to enforce it so I get the benefit of what I had bargained for, we do that.

I talked back at the time of the original 363 determination and my separate ruling on the stay application that followed my 363 ruling by a couple of days about how important GM's survival is to the public interest and the interest not just of the federal taxpayers but the needs and concerns of the states of Michigan and Ohio and the communities in which GM plants operate. We made decisions then about that which was necessary to give New GM the maximum opportunity to thrive. We made rulings then which are res judicata. I don't

think the public interest is served by interfering with what we then put in place in any way.

Certainly, there is no public interest in allowing this collateral attack. It's a private interest to the extent it's any interest. And when a party that was offered and availed itself the opportunity to arbitrate then wishes to take the portion for which it did not win and put the earlier system in play beyond getting the arbitration opportunity for which Congress provided, that is, at the least, not in the public interest and may fairly be regarded as being contrary to the public interest. At best, looking at it most favorably to Rally, it is a wash because it is private interests that are being sought to be advanced and not public ones.

So, as my discussion indicates, folks, I think we got to go by the book and deal with it as I did in my decision dictated just a moment ago by the four enumerated factors articulated in the case law for the grant of a stay. And it is stayed to permit a second opportunity to go to the district court for those seven calendar days. And so as not to put a gun to the head of the district court having to issue a decision, like Judge Kaplan did where he had to work all night on it, I don't want to do that to the district court again if I can avoid it.

But beyond that, it is denied. Rally is authorized and requested, not ordered, but requested to advise the

district court that an application was made to the bankruptcy court, that the bankruptcy court denied it except to the extent of the five days for the reasons that it dictated into the record and that any further application to the bankruptcy court is dispensed with and waived. From now on, we're in the district court, folks.

Yes, sir?

MR. STEINBERG: Your Honor, I just have some brief moments and I thank you for staying so late for today. In your presentation in connection with the stay pending appeal, you said seven calendar days but I believe you also said at one point in time five days. So --

THE COURT: If I did, it was a reference to five business days. Seven calendar days transposes into five --

MR. STEINBERG: Okay.

THE COURT: -- business days. And ever since we amended the federal rules of many different types last December, we now go on bunches of seven calendar days.

MR. STEINBERG: The second thing, Your Honor, is that while I'm not exactly sure what I would have otherwise done during the seven calendar day period because the wind-down agreement is fairly passive, I do want to make sure that I'm still able to present to Your Honor the order that you had asked for --

THE COURT: Of course you can.

MR. STEINBERG: Okay. And I think that's it. I understand that the only activity that will happen from this point on is in the district court of this district.

THE COURT: Correct. All right. It's been a long day. Good evening, gentlemen. We're adjourned.

(Whereupon these proceedings were concluded at 7:23 p.m.)

I N D E X

R U L I N G S

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

_____

LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET**D-486)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 6, 2010